No. 93-18

JUN 14 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LELAND AND KARLA SWENSON,
Petitioners

v.

OGLALA SIOUX TRIBE,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE IDAHO SUPREME COURT

CAROLYN SENECA STEELE*
JAMES S. UNDERWOOD JR.
605 W. Franklin Street
Boise, Idaho 83702
(208) 342-6532
Counsel for Petitioners

June, 1993

*Counsel of Record

THE PRINTING PRESS • 344-1117 • BOISE, IDAHO 83702

QUESTIONS PRESENTED

1. Does the Indian Child Welfare Act confer on a state trial court a right which under general principles of Indian law is reserved to tribes themselves, i.e. the right to determine who is or is not eligible for tribal membership?

2. Do the requirements of the Indian Child Welfare Act, which are founded on the trust doctrine, apply to the voluntary adoptive placement of an illegitimate child born to a non-Indian mother, when the tribe has not made a conclusive determination at the time of the proceedings whether the child is eligible for membership, and when neither the mother nor the child has any ties to a tribe or a reservation, and the child is not being removed from an Indian home or family?

LIST OF PARTIES

The parties to the proceedings below were the petitioners, Leland and Karla Swenson and the respondent the Oglala Sioux Tribe. The putative father Jeff Nothelphim was a party to the original proceedings. He did not appeal or participate in the appellate proceedings and is therefore not named as a party herein. The child Baby Boy Doe was the relator in the underlying proceedings.

The respondent before this Court is the Oglala Sioux Tribe.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5

I. **The ruling by the Idaho Supreme Court that state trial courts may determine eligibility for membership in a tribe violates principles announced by this Court which recognize tribal sovereignty and prohibit courts from interfering with a tribe's internal processes regarding membership.** . . 5

II. **The decisions of the highest courts of the states interpreting the Indian Child Welfare Act are in conflict. The states need clear and definitive guidance from this Court to assist them in interpreting this federal law.** 8

CONCLUSION 13

APPENDIX 1a

Opinion and Judgment of Idaho Supreme Court

TABLE OF AUTHORITIES

Cases:	Page
In the Interest of S.A.M., 703 S.W.2d 603 (Mo. 1986)	9
In the Matter of the Adoption of Baby Boy D., 742 P.2d 1059 (Okl. 1985), *cert. denied Harjo v. Duello*,484 U.S. 1072 (1988)	9
In the Matter of the Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988), *cert. denied, J.Q. v. D.R.L.*, 490 U.S. 1069 (1989)	9
Matter of Adoption of a Child of Indian Heritage, 543 A.2d 925 (N.J. 1988)	10
Matter of Adoption of Baby Boy L., 643 P.2d 168 (1982)	9
Matter of Adoption of Crews, 825 P.2d 305 (Wash. 1992)	11
Matter of Adoption of T.N.F., 781 P.2d 973 (Alaska, 1989)	10
Matter of S.C., 833 P.2d 1244 (Okl. 1992)	11
Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)	10
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	5
Miscellaneous:	
44 Fed. Reg. 67584 (1979)	21
28 U.S.C. § 1257(a)	2
25 U.S.C. §§ 1901-1963, the Indian Child Welfare Act	2

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

LELAND AND KARLA SWENSON, Petitioners,

v.

OGLALA SIOUX TRIBE, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE IDAHO SUPREME COURT

The petitioners Leland and Karla Swenson respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Idaho Supreme Court entered on March 19, 1993.

OPINIONS BELOW

The opinion of the Idaho Supreme Court is reprinted in Appendix A, at p. 1a.

JURISDICTION

The judgment of the Supreme Court of Idaho was entered on March 19, 1993, reversing the district court's ruling that the Indian Child Welfare Act did not apply to the facts of this case. No petition for rehearing was filed. The jurisdiction of this

Court is invoked under 28 U.S.C. § 1257(a).

STATUTE INVOLVED

25 U.S.C.§§ 1901-1963, the Indian Child Welfare Act

STATEMENT OF THE CASE

The central issue of this case is whether the Indian Child Welfare Act (hereinafter "ICWA") governs custody proceedings for an illegitimate child who has only a genetic connection with an Indian tribe, not having been determined to be eligible for membership by the interested tribe at the time of the proceedings; who was born to a non-Indian mother with no ties to an Indian family, tribe, or reservation; and, who is not being removed from an Indian family or an Indian tribal or cultural setting. The interpretation and application of the ICWA, a federal question, was initially raised at pretrial proceedings.

Leland and Karla Swenson filed a petition to terminate the parental rights of Jeff Nothelphim, the biological father of Baby Boy Doe on January 18, 1990. The Swensons gave notice as required by the Indian Child Welfare Act (hereinafter "ICWA") to Jeff Nothelphim, to the Oglala Sioux Tribe (hereinafter "tribe"), and to the Bureau of Indian Affairs based on information received from the child's natural mother that Mr. Nothelphim may be a member of the Oglala Sioux Tribe. The tribe moved to intervene and its motion was granted. The court consolidated the proceedings related to the petition for the termination of parental rights and the petition to adopt. At a preliminary motion hearing, the court ruled that the ICWA would apply to

the proceedings. The parties proceeded with an evidentiary hearing pursuant to this ruling.

At the hearing the issues were (1) whether the child is an "Indian child" as defined by the ICWA; (2) whether the evidence supported a finding beyond a reasonable doubt that custody by the Indian father was likely to result in serious emotional or physical harm to the child; and, (3) whether there was good cause to set aside the placement preferences listed in the ICWA.

At the conclusion of the evidence, the court ruled that the ICWA did not apply to the proceedings. The court based its conclusion in part on an affidavit submitted by the tribe's enrollment director who stated that the tribe did not know if the child was eligible for enrollment. The tribe presented no evidence which verified to the satisfaction of the court that the tribe had determined that the child was eligible for tribal membership. The court also ruled that even if it was determined that the child was eligible for tribal membership, the ICWA did not apply because the ICWA was not intended to govern the placement of an illegitimate child of a non-Indian mother who had never been a part of an Indian family and was not being removed from an Indian home or tribe.

The biological father was never present at any of the proceedings. The court did, however, appoint counsel to represent him and his counsel was present throughout the proceedings. He did not appeal the termination of his parental rights. The child's mother agreed to voluntarily terminate her parental rights in favor of the petitioners in order to permit them to adopt her child.

The district court, sitting in an appellate capacity, affirmed the decision of the trial court, but on different grounds. It held that there was no evidence in the record which supported the finding that the putative father was actually the child's biologi-

cal father, and without such proof, the ICWA did not apply.

The Idaho Supreme Court reversed the lower court rulings, holding that the ICWA applied to the proceedings. It vacated the termination of parental rights and the adoption and remanded the case for further proceedings. The Idaho Supreme Court erroneously held that eligibility for tribal membership is not a factual matter based on the evidence presented by the tribe, but considered it to be a matter of law which the trial court not only has the full authority to determine, but also has the duty to do so if the tribe itself has not made the determination at the time the proceedings come before the court. It stated further that the trial court should have found that this child is eligible for tribal membership. The court stated that a trial court does not need a conclusive determination by a tribe that a child is eligible for tribal membership before the ICWA will apply to custody proceedings.

The opinion reflects a fundamental lack of understanding of certain key concepts of Indian law which Congress incorporated in the ICWA, such as tribal sovereignty and the federal trust doctrine. For example, when the Idaho court declares that a tribe need not make a conclusive determination whether the child is eligible for membership before it applies the ICWA, the court fails to recognize that the pivotal fact which makes the ICWA applicable to a child custody proceeding is the child's eligibility for membership in a federally recognized tribe. Without the tribe's determination of the child's eligibility, the child is not an "Indian child." The ICWA cannot be constitutionally applied to a child who simply has Indian blood but no membership in a federally recognized tribe.

The Idaho Supreme Court also held that the custody of a child who is not being removed from an Indian home or family is nevertheless subject to the provisions of the ICWA. It also

erroneously opined in dictum that the tribe was not represented or given the opportunity to present evidence at a hearing on the adoption. The clerk's records and files reflect that a notice of hearing was provided to the tribe through counsel and that counsel was present at the hearing. Counsel does not deny that they were present. The court itself states and the transcript clearly reflects that the tribe presented evidence on the issue of the placement preferences at the consolidated evidentiary hearing and advocated that custody of the child be given to a member of the biological father's extended family.

REASONS FOR GRANTING THE WRIT

I. The ruling by the Idaho Supreme Court that state trial courts may determine eligibility for membership in a tribe violates principles announced by this Court which recognize tribal sovereignty and prohibit courts from interfering with a tribe's internal processes regarding membership.

The United States Supreme Court has determined that a tribe's right to determine its members is a fundamental element of sovereignty. This Court granted certiorari to the Santa Clara Pueblo to settle the question of whether a federal court could apply equal protection arguments to restrict a tribe's right to determine who it will accept as members. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Julia Martinez sought to have her children admitted as members of her tribe, the Santa Clara Pueblo. However, the tribe had enacted a membership ordinance which barred the admission of children whose father was not a member of the tribe. In this case, because the children's

father was Navajo, they were denied membership. Mrs. Martinez objected on the basis that the tribe permitted the reverse, i.e. it admitted children to membership whose mothers were not Santa Clara so long as their fathers were. This Court held that Congress did not intend to permit courts to intrude on internal tribal matters, especially to adjust relations between tribes and their members. One of the fundamental sovereign rights of tribes is the right to determine who will be admitted to membership. *Santa Clara Pueblo* confirmed that courts may not interfere with a tribe's internal processes regarding membership.

A state trial court cannot make a binding determination of eligibility for tribal membership, even for purposes of applying the ICWA. If a tribe has not determined that a child is eligible for membership, the court cannot independently conclude that the child is so eligible.

The Bureau of Indian Affairs of the U.S. Department of the Interior has published a guide for use by courts in interpreting and applying the ICWA, which addresses the role of a state court in making the determination that a child is eligible for tribal membership. *See Guidelines for State Courts; Indian Child Custody Proceedings*, "Part III, Department of the Interior; Bureau of Indian Affairs;" 44 Fed. Reg. 67584 (November 26, 1979). The guidelines provide that a state court must inquire either of the tribe or of the Bureau of Indian Affairs whether or not a child is eligible for membership in a tribe.

> The *Guidelines* state at Section B:
>
> B.1. Determination That Child Is an Indian
>
> (a) When a state court has reason to believe a child involved in a child custody proceeding is an Indian, the court shall seek verification of the child's status from either the Bureau of Indian Affairs or the child's

> tribe. . .
> (b)(i) The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive.
> (ii) Absent a contrary determination by the tribe that is alleged to be the Indian child's tribe, a determination by the Bureau of Indian Affairs that a child is or is not an Indian child is conclusive.

Neither the ICWA nor the *Guidelines* confer any right or duty to make the determination of eligibility for tribal membership on a state trial court. The state trial court's role is to ascertain whether there is evidence that the tribe has determined that the child is eligible for membership. The state court must then make a finding of fact based on the evidence presented that the tribe has determined that the child is or is not eligible for membership. The court can then rule whether the child is an "Indian child" as defined in the ICWA.

The Idaho Supreme Court erred in concluding that a state court can determine tribal membership for purposes of the ICWA. In this case, the trial court made a finding of fact that the interested tribe had not determined whether the child was eligible for membership at the time the proceedings took place. The trial court then correctly concluded that the child did not fit the ICWA definition of "Indian child." A trial court may not apply the provisions of the Indian Child Welfare Act to custody proceedings of a child who has not been shown to fit the definition of "Indian child." The trial court correctly declined to do so in this case.

Eligibility for tribal membership is critical because Congress enacted the ICWA as an expression of its trust responsibility to

federally recognized tribes. The Act does not apply to individuals who may be Indian by blood, but who are not eligible for membership in a federally recognized tribe. The common element in virtually every case where the various jurisdictions have held that the ICWA applies is the proven and undisputed fact that the child is eligible for membership in the tribe.

The Idaho Supreme Court has misinterpreted and expanded the role of the trial court in ICWA proceedings by ruling that the trial court not only may, but must, make an independent determination of an individual's eligibility for tribal membership. This decision is contrary to well-settled principles of Indian law and should not be left uncorrected.

II. The decisions of the highest courts of the states interpreting the Indian Child Welfare Act are in conflict. The states need clear and definitive guidance from this Court to assist them in interpreting this federal law.

The courts of the several states that have considered the ICWA are divided into two positions, one of which applies the Act if there is a genetic connection between the child and an Indian tribe and the other, which applies the Act only if the child is being removed from an existing Indian environment.

The Supreme Courts of the states of Kansas, Oklahoma, Indiana, and the Court of Appeals of the state of Missouri have not applied the Act if there is only a genetic connection and have held that the ICWA is not applicable unless a child is being removed from an Indian family. These courts rely upon the Congressional declaration of policy which states that ". . .(I)t is the policy of this nation to protect the best interests of Indian

children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families . . .". 25 U.S.C. §1902.

This view is represented by the opinion of the Supreme Court of the State of Kansas in *Matter of Adoption of Baby Boy L.*, 643 P.2d 168 (1982). Baby Boy L. was born out of wedlock to a non-Indian woman. She executed a consent to adoption by specific adoptive parents. The child was never in the care or custody of the putative father and never was a part of any Indian family. The court held that the legislative history of the ICWA and the statute itself confirm that its purpose was to maintain family and tribal relationships and assure that certain standards would be observed in removing Indian children from their homes and tribes. The court said concerning the purpose of the ICWA:

> "It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother." Id. at 175.

See In the Matter of the Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988), cert. denied sub nom., J.Q. v. D.R.L., 490 U.S. 1069, 109 S.Ct. 2072, 104 L.Ed.2d 636 (1989); *In the Matter of the Adoption of Baby Boy D.*, 742 P.2d 1059 (Okl. 1985) reh'g denied (1987), cert denied sub nom., Harjo v. Duello, 484 U.S. 1072, 108 S.Ct. 1042, 98 L. Ed. 2d 1005 (1988); and, *In the Interest of S.A.M.*, 703 S.W.2d 603 (Mo.App.1986). These decisions emphasize that Congress' express purpose for enacting the ICWA was to establish minimum standards for the

removal of Indian children from their families.

Representative of those states who require only a genetic connection to an Indian tribe is Alaska. *See Matter of Adoption of T.N.F.*, 781 P.2d 973 (Alaska, 1989). The New Jersey Supreme Court, in *Matter of Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988), held that the ICWA applied even though the child was not shown to be eligible for membership in the Rosebud Sioux Tribe. The court stated, "Congress intended that a child's eligibility for tribal membership be a question of fact dependent on his or her actual ancestry." Id. at 933.

This Court has examined the jurisdictional and procedural requirements of the ICWA in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597, 104 L. Ed.2d 29 (1989), and affirmed the jurisdiction of a tribal court when an Indian child is domiciled on a reservation. Although the Court confirmed the ICWA's fundamental purpose, preventing the removal of Indian children from their Indian cultural setting, the question of whether the Act was intended to apply to the placement of a child such as the one in the instant case remains unanswered.

This case involves the adoption of an illegitimate child who was born to a non-Indian woman. Both she and the child were totally abandoned by the father when he learned that she was pregnant. The child's only relationship with a tribe is that his birth resulted from an insemination by a man who is a member of a tribe, but who had himself left the reservation many years before. He has children from a former marriage whom he does not contact nor support. Nor do the children have any contact with or support from the father's tribe or family. Those children are not enrolled members of the tribe. This child's mother made a difficult but considered decision that it was in his best interest

to voluntarily place him for adoption. She personally selected adoptive parents who were similar to herself in age, appearance, and religious affiliation. The child has lived with and bonded with the adoptive parents since he was one day old. Does the ICWA require the custody of a child born under circumstances such as these, with no tangible ties to a tribe, to be surrendered to a distant tribal government?

The most recent state court decisions concerning the interpretation of the ICWA, decided after *Holyfield*, come from the State of Washington and from the State of Oklahoma. The Washington Supreme Court held in *Matter of Adoption of Crews*, 118 Wash.2d 561, 825 P.2d 305 (1992), that the ICWA did not apply to the facts of the case because the Indian child was not being removed from an Indian cultural setting, the natural parents had no substantive ties to a specific tribe, and neither the parents nor their families resided or planned to reside on a reservation. The Washington Supreme Court added that in such circumstances, "whether or when a child meets the definition of `Indian child' under ICWA is not controlling." Id. at 311. The Oklahoma Supreme Court in *Matter of S.C.*, 833 P.2d 1249 (Okl. 1992) recently strongly resubscribed to the view that the purpose of the ICWA is to prevent the removal of Indian children from an existing Indian family unit.

The petitioners ask this Court to interpret and clarify the substantive provisions of the ICWA. Increasing numbers of Indian child custody cases are being appealed through the state court systems because the states and the litigants do not have a clear understanding of how to apply this federal law. Litigants and courts could be spared the costs of countless appeals. Children who have formed the strong bonds of a parent-child relationship with adoptive parents may be spared the pain and anguish of unnecessary separations.

State courts need guidance from this Court with respect to interpreting the Indian Child Welfare Act.

CONCLUSION

For these various reasons, the petitioners pray that this petition for certiorari be granted.

Respectfully submitted,

CAROLYN SENECA STEELE
JAMES S. UNDERWOOD JR.
605 W. Franklin Street
Boise, Idaho 83701
(208) 342-6532
Counsel for Petitioners

APPENDIX A

1993 Opinion No. 29

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 19512

In the Matter of:	)	
BABY BOY DOE,		
A minor child.	)	Boise, November 1992 Term
	)	
	)	
INDIAN TRIBE,	)	
Intervenor-Appellant	)	
Appellant on Appeal,	)	
	)	
v.	)	Filed: March 19, 1993
	)	
JOE DOE and JANE DOE,	)	
	)	Frederick C.Lyon, Clerk
Petitioners-Respondents-	)	
Respondents on Appeal,	)	

Appeal from the District Court of the Third Judicial District of the State of Idaho, Canyon County. Hon. Dennis E. Goff, District Judge. Hon. Gary D. DeMeyer, Magistrate Judge.

Appeal from termination of parental rights by magistrate judge and award of attorney fees on appeal by district judge. Decision that the Indian Child Welfare Act does not apply, *reversed.* Termination of parental rights, *vacated and remanded.* Award of attorney fees, *reversed.*

Idaho Legal Aid Services, Inc. of Coeur d' Alene, Idaho, attorney for appellant. Shannon D. Work argued.

Underwood & Steele, Chtd., Boise, Idaho, attorneys for respondents. James S. Underwood argued.

JOHNSON, J.

This case concerns the application of the federal Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1923, to the termination of the parental rights of an Indian father and the adoption of his child by a non-Indian couple. We reverse the decision of the magistrate judge (the trial court) that ICWA does not apply to the termination proceeding and to the placement of the child. We vacate the termination order, and remand the case to the trial court for further proceedings. We also reverse the award of attorney fees by the district judge on appeal from the trial court's decision.

I.
THE BACKGROUND AND PRIOR PROCEEDINGS

The child who is the subject of this case was born in 1989. The mother is a non-Indian and was never married to the child's father. The child's father is an enrolled member of the Indian tribe (the tribe). The father maintained no contact with the mother during her pregnancy and has had no contact with the child since the birth. Shortly after the child was born, the mother approached an adoption agency to arrange adoption of the child. Through the agency, the mother chose a non-Indian couple (the adoptive parents) to adopt the child and placed the child in their custody. The child has remained with the adoptive parents throughout the course of this case.

After placing the child with the adoptive parents, the mother consented to voluntary termination of her parental rights and to the adoption of the child by the adoptive parents. The adoptive parents petitioned the trial court for termination of the parental rights of the child's parents. Because the mother indicated to the adoption agency that the child's father was a member of the tribe, the adoptive parents sent the required notice of the termination proceedings to the father and the tribe pursuant to federal guidelines and ICWA.

At the first hearing concerning termination of the father's parental rights, the father did not appear, but a non-attorney advocate from the tribe appeared at this hearing on behalf of the father and the tribe. The non-attorney advocate asserted that the father wanted custody of the child and that the tribe wished to intervene and have the trial court transfer the proceedings to tribal court pursuant to ICWA. The trial court appointed counsel to represent the father and granted the tribe additional time to move to intervene and to seek transfer of the case to tribal court.

On May 3, 1990, the trial court heard the motions to intervene and to transfer. In allowing the tribe to intervene, the trial court made an oral finding that the child was an Indian child and the ICWA governed the proceedings. This finding was based on a letter from the tribe's enrollment director indicating the father had applied to enroll the child in the tribe. The trial court stated that this letter was a determination by the tribe that the child was eligible for membership in the tribe. Because the mother filed an objection to the transfer of the case to the tribal court, the trial court rejected the transfer, as required by ICWA.

On May 21, 1990, the trial court held another hearing regarding termination of the father's parental rights. The tribe argued ICWA governed the proceedings and required the child to be

placed for adoption within the tribal community. The tribe advocated placing the child with the child's paternal aunt and uncle, who lived on the reservation and wanted to adopt the child into their family. The adoptive parents argued against application of ICWA and against placing the child on the reservation, even if ICWA applied to the proceedings.

The trial court ruled that ICWA did not govern the proceedings, and terminated the father's parental rights without applying the requirements of ICWA. Although the trial court found the father was the child's natural father and was a member of the tribe, the trial court ruled that the child was not an "Indian child" as defined in ICWA, because the child was not eligible for membership in the tribe. The trial court cited guidelines published by the Bureau of Indian Affairs (BIA) as controlling. These guidelines advise state courts to treat determinations by an Indian tribe regarding eligibility for membership in the tribe as conclusive. Based on an affidavit from the enrollment director of the tribe, the trial court found that the tribe had declined to find the child was eligible for membership in the tribe and that this meant the tribe had conclusively determined the child was not eligible for membership in the tribe.

As an alternative legal theory to support its ruling that ICWA did not govern the termination proceedings, the trial court adopted an "Indian family" test as a prerequisite to application of ICWA. Under this approach, the trial court held ICWA only applied to child custody proceedings in which an Indian child is removed from an existing Indian family. The trial court reasoned that even if the child met the definition of "Indian child," ICWA does not apply where a child has never lived within the Indian community or has never been exposed to Indian culture. In this case, the trial court found the child was not being removed from an existing Indian family because the child had either lived

with the non-Indian mother or the non-Indian adoptive parents since birth. The trial court also noted that the child had no contact with the father or any member of the father's family and that the father's family had not pursued a relationship with the child.

The trial court terminated the father's parental rights, and the tribe appealed to the district judge. The district judge affirmed the trial court's findings, but on different grounds from those stated by the trial court. The district judge held the child was not an Indian child because there was insufficient proof of paternity in the record to support a finding that the child was the legal child of the father. The district judge also found that the tribe brought the appeal frivolously, unreasonably, and without foundation and ordered the tribe to pay more than $8,500.00 in attorney fees pursuant to I.C. §12-121.

The tribe appealed to this Court, asserting the application of ICWA to the termination of the father's parental rights and to the placement of the child. The tribe also asserts that regardless of the application of ICWA, the district judge improperly assessed attorney fees against the tribe.

II.
THE PROVISIONS OF ICWA

In 1978 Congress passed ICWA to address concerns surrounding the high incidence of removal of Indian children from their Indian families and tribes and the placement of Indian children in adoptive or foster homes outside of their extended families, tribes and cultures. 25 U.S.C. §§1901, 1902. ICWA recognizes that cultural biases in child custody proceedings contribute to this problem. To promote the stability of Indian tribes and to counter cultural biases, Congress enacted ICWA to

provide minimum procedural and substantive requirements which state courts must apply to child custody proceedings involving Indian children.

In order to invoke the requirements of ICWA, state courts must first determine whether the proceedings are "child custody proceedings" as defined by 25 U.S.C. §1903(1), and whether the child involved is an "Indian child" as defined by 25 U.S.C. §1903(4). Without dispute, the proceedings in this case are "child custody" proceedings as defined in ICWA. ICWA expressly includes termination of parental rights proceedings within the statutory definition of child custody proceedings. §1903(1)(ii).

The basic dispute in this case is whether the child is an "Indian child" under ICWA. ICWA defines an Indian child as: "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." §1903(4). Whether the child meets this definition is discussed in the following section.

If these prerequisites are met, ICWA supplies procedural requirements and substantive standards that must be used by the state court instead of procedures and standards under state law. Several provisions of ICWA would apply to the proceedings in this case, if ICWA were applicable. ICWA requires that Notice of the proceeding be given to the Indian parent and the Indian tribe, and that the tribe be given the opportunity to intervene in the proceedings. §§191(c), 1912(a). Before terminating an Indian parent's parental rights, ICWA requires the state court to make a determination on the record that beyond a reasonable doubt termination is required to prevent serious emotional or physical damage to the Indian child. §1912(f). In an adoption proceeding, ICWA requires the state court to give preference to

placement of the child with a member of the child's extended family, with the tribe, or with another Indian family. §1915(a). In determining whether good cause exists for placement outside of the Indian community, the state court is directed to examine the reasons given in light of "the prevailing social and cultural standards of the Indian community." §1915(d).

III.
THE CHILD IS AN "INDIAN CHILD."

The Indian tribe asserts that the trial court misapplied federal guidelines in concluding the child is not an Indian child under ICWA, and therefore, incorrectly found ICWA did not govern the proceedings. We agree.

This appeal is taken from a decision of the district judge sitting as an appellate court. Where the same issue presented to the trial court was presented to the district judge, and the district judge, sitting in an appellate capacity, made a decision based on the record established in the trial court, this Court will review the trial court's decision without deferring to the decision of the district judge. *Robinson v. Joint Sch. Dist. No. 331*, 105 Idaho 487, 490, 670 P.2d 894, 897 (1983).

The adoptive parents argue that the trial court's decision that the child was not eligible for membership in the tribe is a question of fact to which we must give deference on appeal if it is supported by substantial and competent evidence. This mischaracterizes the issue. Whether the trial court correctly applied ICWA to the facts of the case requires this Court to examine the legal theories employed by the trial court in determining that the child was not eligible for membership in the tribe. This is a question of law and is subject to free review by this Court.

When a child custody matter requires a state court to resolve whether a child is an Indian child, the state court must make the necessary determinations regarding application of ICWA. This includes determining whether the child meets the definition of an Indian child contained in 25 U.S.C. §1903(4). In this case, the trial court correctly looked to federal guidelines published by the BIA to aid its determination. The BIA guidelines state:

B.1. Determination That a Child is an Indian

> (a) When a state court has reason to believe a child involved in a child custody proceeding is an Indian, the court shall seek verification of the child's status from either the Bureau of Indian Affairs or the child's tribe . . . .
>
> (b)(i) The determination by a tribe that a child . . . is or is not eligible for membership in that tribe . . . is conclusive.

44 Fed. Reg. 67,584 (1979)

The enrollment director for the tribe stated in an affidavit admitted in evidence at the May 21, 1990 hearing:

> 3. That the primary consideration is [sic] permitting a tribal member to enroll his or her child is residency on the reservation at the time of the child's birth, but . . landownership may substitute for residency;
>
> 4. That [the father] has owned land on the reservation since 1987;
>
> 5. That an additional requirement for enrolling a child is

providing a birth certificate naming a tribal member as a parent;

> 6. That the birth certificate is missing from [the child's] application;
>
> 7. That a Paternity Affidavit signed by both parents naming a tribal member as a biological parent may substitute if the father's name does not appear on the birth certificate;
>
> . . .
>
> 11. That during the pendency of the application and prior to its vote, the Tribal Enrollment Committee can not state conclusively whether or not the applicant is eligible for enrollment with the [tribe];
>
> 12. That [the enrollment director] cannot at this time state with certainty that [the child] is eligible for enroll ment with the [tribe] because [the child's] application is incomplete and without the required proof of eligibility, [the child] cannot be enrolled.

In applying the federal guidelines, the trial court concluded:

The [t]ribe has declined to find that [the child] is either eligible for membership in that Tribe or that [the child] is a member of that Tribe. Their determination is conclusive and therefore [the child] is not an Indian Child as defined in 25 USCS [sic] Sec. 1903(4) and the Indian Child Welfare Act is not applicable to this proceeding.

The trial court's decision amounts to imposing a requirement that a tribe reach a conclusive determination regarding a child's eligibility for membership as a prerequisite to application of ICWA. We do not read ICWA or the BIA guidelines to impose this requirement.

ICWA requires the state courts to determine application of ICWA. This includes a determination *by the trial court* whether the child is an "Indian child" as defined by ICWA. There is no requirement that a tribe must make a conclusive determination of a child's eligibility for membership in the tribe as proof that the child is an Indian child. The provision in the BIA guidelines requiring a state court to give conclusive effect to a determination by an Indian tribe as to a child's eligibility for membership in that Indian tribe is merely to aid state courts in deciding whether to apply ICWA. This directive does not require a tribe to determine a child's eligibility for membership before a state court may apply ICWA.

In addition, the statement in the enrollment director's affidavit is clearly not a "determination" as intended by the BIA guidelines. At most, it is a statement by the tribe that no determination was possible at that time. There is no evidence in the record to support a finding that the tribe determined the child is not eligible for tribal membership.

If a state court does not have a conclusive determination from the tribe or the BIA regarding a child's eligibility for tribal membership, the trial court must make its own determination regarding the child's eligibility for tribal membership. The party asserting the applicability of ICWA has the burden of producing the necessary evidence for the trial court to make its determination.

In this case, the evidence presented to the trial court established the applicability of ICWA. The evidence contained the

tribe's requirements for "enrollment." Although enrollment and membership are not synonymous, eligibility for enrollment is evidence that the requirements for membership are met. 44 Fed Re. 67,584, 67,586 (enrollment is a common but not exclusive evidentiary means of determining membership in a tribe). Enrollment is an administrative function. The core of the inquiry under ICWA is eligibility for membership in the parent's tribe. The affidavit of the enrollment director explains the only reason the tribe could not make a conclusive determination regarding the child's eligibility for enrollment was because the application was missing documentary evidence regarding paternity in the form of a birth certificate or paternity affidavit. The trial court, however, found that the father is one of the child's parents. This finding, together with the father's ownership of land on the reservation, establishes the child's eligibility for membership in the tribe. The other requirements for enrollment go to the administrative aspect of enrollment and are not requirements of eligibility for tribal membership.

IV.
THE TRIAL COURT INCORRECTLY APPLIED AN "INDIAN FAMILY" REQUIREMENT.

The tribe also challenges the trial court's alternative holding that an Indian child must be part of an "Indian family" before ICWA applies. The tribe asserts this is an improper restriction on the application of ICWA. We agree.

The trial court's use of an Indian family requirement as a prerequisite to application of ICWA is a question of law to which this Court gives free review.

Although an Indian family requirement has been applied by the courts of other states, we believe that the United States

Supreme Court has effectively undermined the imposition of this requirement.

In *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989), the Supreme Court held that federal domicile law applies in state court proceedings involving ICWA and that the parents' tribe has exclusive jurisdiction over the child custody proceeding even though the illegitimate Indian children in that case had never been on the reservation, with their Indian parents, or within the Indian culture. *Mississippi Choctaw* indicates that the jurisdictional provisions of ICWA apply to child custody proceedings involving Indian children regardless of where the children are born or where they are proposed for adoption. This application of ICWA is based on the interest the tribe has in its children.

In this case, application of an Indian family requirement would allow the non-Indian mother to circumvent application of ICWA and the tribe's interest in the child by making sure that the child is kept away from the reservation and out of contact with the father and his family. This would undermine the tribe's interest in its Indian children, which the Supreme Court recognized in *Mississippi Choctaw*.

We also reject application of an Indian family requirement because the provisions of ICWA do not contain any limitation based on where the child is located. Limiting ICWA to situations in which an Indian child is being removed from an existing Indian family is, therefore, a judicially created exception to ICWA. Congress passed ICWA to limit state court power by creating mandatory protective procedures and minimum evidentiary standards that must by applied in child custody proceedings concerning Indian children. In light of the structure and nature of ICWA, it is inappropriate to use a judicially created exception to circumvent the mandates of ICWA.

V.
ICWA IS NOT INAPPLICABLE IN THIS CASE ON THE GROUND THAT THERE IS NO PROOF OF THE FATHER'S PATERNITY.

The adoptive parents invite this Court to find that the trial court's decision concerning the applicability of ICWA is harmless. They ask us to avoid remanding the case back to the trial court by finding ICWA does not apply because the tribe did not sufficiently prove the father's paternity. This is the approach taken by the district judge on appeal. We decline the invitation to find ICWA is inapplicable for this reason.

The district judge held that the requirements of ICWA do not apply in this case because the tribe failed to prove that the child was the child of the father. We reject this because it undermines findings of fact of the trial court.

In its order, the trial court specifically found that the father was one of the child's parents. This is a finding of fact that will not be overturned on appeal if it is supported by substantial and competent evidence. We note that paternity was not an issue in this case. Neither the mother not the adoptive parents disputed the father's paternity. In fact, in their briefs to the district judge, neither party argued the issue of paternity.

The trial court had sufficient evidence to support its finding that the father was one of the child's parents. At the hearing on the motion to intervene, the tribe submitted a letter from the enrollment director for the tribe stating that the father had applied for the child's enrollment in the tribe. At the hearing for termination of parental rights, the trial court heard testimony from the father's sister that she had personally registered a paternity affidavit with the state of Idaho on the behalf of the father. The affidavit from the enrollment director for the tribe

submitted during the May 21, 1990 hearing indicates the father had signed a paternity affidavit that was on file with the tribe. The foregoing evidence taken together is sufficient to support the trial court's finding that the father is one of the child's parents.

VI.
WE DECLINE TO DECIDE THE FATHER'S RIGHTS AND THE PLACEMENT OF THE CHILD UNDER ICWA.

The adoptive parents assert that even if ICWA governs the proceedings, this Court should hold that ICWA's requirements were met and should not upset the termination of the father's parental rights or the placement of the child. We decline to do so.

We are acutely aware that more than three years have elapsed since the child was placed with adoptive parents. We understand the difficulty and danger of removing a child of this age from the home in which the child has been nurtured during this formative period. We cannot ignore, however, that the termination of the father's rights and the placement of the child by adoption were accomplished without applying ICWA.

In ordering the termination of the father's parental rights, the trial court employed the clear and convincing evidence standard of state law, rather than the beyond a reasonable doubt standard of ICWA. Following the termination of the father's parental rights, the trial court held an adoptive hearing in which the tribe was not represented or given the opportunity to present evidence. The trial court did not address the preference for adoptive placement under 25 U.S.C. § 1915(a).

The trial court must address the questions of termination and

placement under ICWA on remand.

VI.
WE REVERSE THE AWARD OF ATTORNEY FEES BY THE DISTRICT JUDGE.

Because we find the trial court was incorrect in not applying ICWA to the proceedings in this case, we reverse the district judge's award of attorney fees based on the district judge's finding that the claim was frivolous, unreasonable, or without foundation.

VII.
CONCLUSION

We reverse the trial court's decision that ICWA does not apply to the proceedings in this case, vacate the termination order, and remand the case to the trial court for further proceedings.

We reverse the district judge's award of attorney fees.

We award the tribe costs on appeal. The tribe did not request attorney fees on appeal.

BISTLINE, McDEVITT and TROUT, J.J., concur.

BAKES, J. Pro Tem., (following retirement on February 1, 1993), dissenting:

I believe we should follow the decisions of the Supreme Courts of Washington, Kansas and New Jersey in determining whether the Indian Child Welfare Act applied to this case. The decision of the United States Supreme Court in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597 (1989), relied on by this Court in this case, is not dispositive. The facts of the *Holyfield* case were very different. In *Holyfield* both the parents were Indians and both were domiciled on the reservation. The Supreme Court in *Holyfield* held that the

policy of the ICWA could not be defeated by "individual reservation-domiciled tribal members" intentionally leaving the reservation to have the child and put it up for adoption so that the child's domicile would not be on the reservation. *Mississippi Band of Choctaw Indians v. Holyfield*, 109 S.Ct. at 1610.

The facts of this case are significantly different. The trial court's findings of fact, which are supported by the evidence in the record, conclude that the only contacts between the reputed Indian father and the non-Indian mother were away from the reservation; the non-Indian mother never lived with the reputed Indian father; and neither lived on the Indian reservation. Once the reputed Indian father learned that the non-Indian mother was pregnant he stopped all contact with her and never claimed paternity of the child. No Indian family or reservation domicile is involved in this case. All that is involved is a non-Indian woman, with no contacts with an Indian tribe or reservation, who became impregnated, allegedly by a man who reputedly is an enrolled member of an Indian tribe.

In contrast, both parents in the *Holyfield* case were of Indian heritage, both were domiciled on the reservation, and both parents were involved in the adoption process.

In the recent case of the *Matter of Adoption of Crews*, 825 P.2d 305 (Wash. 1992), the Washington Supreme Court quoted from the hearings of Congress to the effect that the purpose of the Act was to stop the breakup of Indian families by the "removal of Indian children from their families and the placement of such children in foster or adoptive [Indian] homes which will reflect the unique values of Indian culture. . ." 25 U.S.C. § 1901 (4)-(5). In quoting from *In re Adoption of Baby Boy L.*, 642 P.2d 168 (Kan. 1982), the Court in *Crews* agreed that:

> the underlying thread that runs throughout the entire Act [is] to the effect that the Act is concerned with the removal of Indian children from an existing family unit and the resultant breakup of the Indian family.

Matter of Adoption of Crews, 835 P.2d at 309.

For the breakup of an Indian family to occur it is necessary for an "Indian family" to exist. Recently the Oklahoma Supreme Court, in *Matter of S.C.*, 833 P.2d 1244 (Okl. 1992), similarly expressed the intent of the ICWA to be to prevent the "removal of Indian children form *an existing Indian Family unit and the resultant breakup of the Indian family*." *Matter of S.C.*, 833 P.2d at 1255 (emphasis added); see also *Matter of Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988). While a child of Indian heritage must be involved in an adoption or foster placement for the ICWA to be applicable, the Act can also be reasonably interpreted to require that the placement of the child not breakup an "Indian family" unit. Where no Indian family unit has ever existed, no breakup of an Indian family unit can take place.

The rationale of these state cases, which hold that an Indian family unit must be present before the ICWA is applicable, is supported by more recent events in Congress. A 1987 amendment to the ICWA presented to the Senate by the Committee on Indian Affairs would have made application of the ICWA mandatory regardless of whether the child had "previously lived in Indian Country, in an Indian cultural environment or with an Indian parent." See S. 1976, 100 Cong., 1st Sess., 133 Cong. Rec. S18532, S18533 (daily ed. Dec. 19, 1987). The amendment never made it to the floor of the Senate and has not been presented since. Congress was well aware of the decisions employing the "existing Indian family" doctrine and apparently

chose not to change the statutory language of the ICWA to modify that interpretation, as the Oklahoma Supreme Court has observed. *Matter of S. C.*, 833 P.2d at 1255. The child involved in this case has never been part of an "Indian family", and accordingly, the ICWA does not apply to the facts of this case.

(2)

No. 93-18

Supreme Court, U.S.
FILED
JUN 14 1993
OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1993

LELAND AND KARLA SWENSON, *Petitioners*

v.

OGLALA SIOUX TRIBE, *Respondents*

SUPPLEMENTAL APPENDIX

CAROLYN SENECA STEELE*
JAMES S. UNDERWOOD JR.
605 W. Franklin Street
Boise, Idaho 83702
(208) 342-6532

Counsel for Petitioners

June, 1993

**Counsel of Record*

TABLE OF CONTENTS

SUPPLEMENTAL APPENDIX

Memorandum Decision and Order of the District Court, Third Judicial District, Canyon County, Idaho, dated July 24, 1991 4

Findings of Fact, Conclusions of Law, and Order of the Magistrate Court, Canyon County, Idaho, dated June 7, 1990 5

IN THE DISTRICT COURT
OF THE
THIRD JUDICIAL DISTRICT
OF THE
STATE OF IDAHO,
IN AND FOR THE COUNTY OF CANYON

In the Matter of:	)	Case No. SP-90-00106C
BABY BOY DAVIS,	)	
	)	MEMORANDUM DECISION AND ORDER
A Minor Child.	)	

Baby Boy Davis was born on September 18, 1989, in Healdsburg, California. His mother, Brenda Davis, is not an Indian and at the time of his birth, was unmarried. The man asserted to be the putative father, has been represented to the court as a member of the Oglala Sioux Tribe. He met Davis while living off the reservation. Davis never lived with the putative father and when he learned she was pregnant, he stopped communicating with her and did not provide any assistance, financial or otherwise. Prior to the child's birth, Davis made arrangements for his adoption. She consented to the adoption of the child, but reserved the right to reassert her parental rights if it appeared the putative father or his Tribe would try to obtain custody.

On January 18, 1990, a Petition For Termination Of Parent-Child Relationship was filed in the Magistrates Division of the Third Judicial District Court asking the court to terminate the parental rights of the natural parents and give legal Custody to the Petitioners, Lee and Karla Swenson. Notice of intent to terminate parental rights directed to the putative father and his Tribe, the Oglala Sioux, was filed on January 18, 1990. On February 8, 1990, a hearing was held on the matter which was attended by the Petitioners and a non-lawyer representative of the Indian Child Welfare Center, Caroline Cuny. The putative father, Jeff Not Help Him, did not appear in person.

Cuny advised the court of Not Help Him's intention to object, but stated neither Not Help Him nor the Oglala Sioux Tribe (Tribe) had an attorney representing them. The court continued the matter for thirty days to allow Not Help Him to file a petition to intervene or transfer jurisdiction, and for Not Help Him to secure an attorney. On May 8, 1990, the Tribe was allowed to intervene on its assertion that Baby Boy Davis is an "Indian child" under the Indian Child Welfare Act (ICWA) and that it is the child's tribe. On May 21, 1990, the hearing resumed with the Tribe, the Petitioners, the child, and Not Help Him represented by counsel.

The court heard evidence and argument from each of the parties, except for Not Help Him, who did not appear. Not Help Him's court appointed attorney told the court, despite repeated attempts, she had not communicated with Not Help Him. On June 7, 1990, the court issued its Findings Of Fact, Conclusions Of Law And Order. The court concluded that the Indian Child Welfare Act (ICWA) did not apply in this case because the child was not an "Indian child" as defined in the Act, 25 U.S.C.S. §1903(4); and that grounds for termination, pursuant to Idaho Code §16-2009. were proven by clear and convincing evidence. The court ordered the termination of Not Help Him's parental rights.

On July 16, 1990, the Tribe filed a Notice Of Appeal. The Tribe contends the Magistrate erred 1) in determining the provisions of the ICWA did not apply to the proceeding; 2) by applying an incorrect

standard in finding that the ICWA does not apply to the factual situation of the proceeding; 3) in his conclusions in view of the reliable probative and substantial evidence of the record; and 4) in failing to comply with the standard of proof requirements of the IWCA (sic).

In its Brief, the Tribe limits its argument to two issues: 1) does the ICWA apply to this case, and 2) if the ICWA applies, should the child be placed within his father's tribe in accordance with ICWA placement preferences. An assignment of error unsupported by either cited authority or argument in Appellant's brief will not be reviewed on appeal. Price v. Aztec Ltd., Inc., 108 ID 674, 678, 701 P.2d 294 (1985). Therefore, this Court will confine its discussion to the issues raised in the Tribe's Brief.

In exercising appellate review this Court shall not set aside the trial court's findings of fact unless clearly erroneous. Muniz v. Schrader, 115 Idaho 497, 500, 767 P.2d 1272 (1989). "[C]lear error will not be deemed to exist if the court's findings are supported by substantial and competent, though conflicting evidence." Id. Evidence is regarded "as 'substantial' if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven."

Ortiz v. Dept. of Health & Welfare, 113 Idaho 682, 684, 747 P.2d 91, 93 (Ct.App.1987).

> Where evidence is conflicting, the task of weighing such evidence falls within the province of the trial court. Id. Finally, when a trial court's findings of fact are challenged on appeal, the appellant has the burden of showing error, and reviewing court will review the evidence in a light most favorable to the respondent.

Hugginson v. Westergard, 100 Idaho 687, 604 P.2d 51 (1979); Salazar v. Tilly, supra.Muniz, 115 Idaho at 500

To invoke the requirements of the ICWA there are two prerequisites.

> First, it must be determined that the proceeding

> is a "child custody proceeding" as defined by the Act. Id, §1903 (1). Once it has been determined that the proceeding is a child custody proceed ing, it must then be determined whether or not the child is an Indian child. Id. §1903(4), (9) .

In The Matter Of Appeal In Maricopa County, 136 Ariz 528, 667 P.2d 228, 231 (Ct.App.1983). Here, the proceeding is a child custody proceeding as defined by the Act. See. 25 U.S.C.S. §1903(1) (1983). The determinative issue is whether or not Baby Boy Davis is an "Indian child" as defined by the Act. The ICWA defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C.S. §1903(4) (1983). The Tribe contends that Baby Boy Davis is an "Indian child."

In looking at the applicability of the ICWA to a child born out of wedlock the Arizona Court of Appeals in In the Matter of the Appeal In Maricopa County, held that "[b]efore any section of the Act applies, it must be established on the record that the child meets one or both of the definitional criteria; only then does a parent or tribe qualify for 'protection' under the ICWA." (Citation omitted.) Maricopa County, 667 P.2d at 232.

The federal "guidelines for state courts" identify criteria for this determination, giving preference to a determination by the child's asserted tribe. "The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive." 44 Federal Register 67584, 67586 (1979). In her affidavit, Joan Decker states "[t]hat your affiant cannot at this time state with certainty tht (sic) Baby Boy Davis is eligible for enrollment with the Oglala Sioux Tribe because his application is incomplete and without the required proof of eligibility, he cannot be enrolled." Petitioner's Exhibit 11. The Magistrate concluded that this determination was costs

conclusive pursuant to the federal guidelines and that the ICWA did not apply. The tribe argues that although the Tribal Enrollment Director was unable to determine the child's eligibility for enrollment because the application was incomplete, an incomplete application is not a determination of ineligibility. Therefore, a conclusive determination has not been made by the tribe, and the child's eligibility should be a question of fact dependent on his actual ancestry. Matter of Adoption of a Child of Indian Heritage, 111 N.J. 192, 543 A.2d 925, 933) (1988). In Matter of Adoption Of A Child Of Indian Heritage, the New Jersey Supreme Court held that since the ancestry of the child in question was in dispute a definitive resolution of his status as an Indian child would require an evidentiary hearing. Id.

The Arizona Court of Appeals in Maricopa County, held that "in the case of a child born out of wedlock to a non-Indian mother, until such time as the putative Indian father acknowledges or establishes paternity the provisions of the ICWA are not applicable. Id., 667 P.2d at 233. Neither the Petitioners nor the Tribe argues that Not Help Him is not the biological father of Baby Boy Davis. In Maricopa County, there also was no serious doubt or dispute as to the biological father of the child at issue. However, the Arizona Court held there must be more than mere speculation of paternity. Id.

In this case, there is no competent evidence in the record that Not Help Him is in fact the child's "parent" as defined by the ICWA. The ICWA defines a "parent" as:

> . . .any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.

25 U.S.C.S. §1903(9) (1983). No evidentiary hearing was held. The record does not contain an acknowledgement by Not Help Him, an attempt to establish paternity by Not Help Him, or an acknowledgement of Not Help Him's paternity by Davis. In fact, Not Help Him has been

notably absent from these proceedings. His court appointed counsel notified him by letter in February, again in March, and again in April of 1990, of the need for action on his part. The Magistrate in his findings, determined that Not Help Him had abandoned Baby Boy Davis.

The only indication in the record by Not Help Him or Davis of Not Help Him's paternity is a reference to an affidavit made to the tribal enrollment committee contained in an affidavit by Joan Decker, the Oglala Sioux Tribal Enrollment Director. Petitioner's Exhibit 11. The record does not contain sufficient facts regarding Baby Boy Davis' actual ancestry to support the Tribe's contention that they alone provide proof that the child is an "Indian child" for purposes of the ICWA.

The Respondents, Lee and Karla Swenson, argue, and this Court agrees, that the Tribe failed to meet its burden of proving the applicability of the ICWA. The Tribe had notice of the pending action in January 1990, the hearing was held on May 21, 1990. The Tribe had sufficient time to complete Baby Boy Davis' application, or to get sufficient proof of the child's actual ancestry to persuade the court the child was an "Indian child" for purposes of the Act. Although on different grounds, this Court finds the Magistrate's finding that the ICWA did not apply is supported by substantial and competent evidence.

The tribe also argues that Baby Boy Davis should be placed within his father's tribe in accordance with ICWA placement preferences. The Magistrate, upon determining the ICWA did not apply, was under no obligation to act in accordance with ICWA placement preferences. There is substantial and competent, though conflicting, evidence in the record to support the Magistrate's termination of Not Help Him's parental rights and the placement of the child with the Petitioners pursuant to I.C. §16-2009.

Finally, the Respondents request an award of attorney fees pursuant to I.C. §12-121. The Respondents argue this appeal was brought or pursued frivolously, unreasonably, or without foundation. The Respondents point out that the Appellant has not had to bear the expense of the custody proceedings below, but has dramatically increased the costs

for the Respondents by intervening in the case and then failing to prove that it has a legal interest to protect. The Respondent cites the testimony of Cuny, who stated that the Tribe has retained counsel and could afford to pay for its own legal representation. Transcript p.173-174.

Attorney fees are awardable under I.C. §12-121 if the law is well settled, the facts have been found upon substantial evidence, and the Appellant has made no substantial showing that the lower court misapplied the law to those facts. State of Alaska Ex Rel. Sweet v. Hansen, 116 Idaho 927, 929, 782 P.2d 50 (Ct.App.1989). Here, the Tribe has not made any substantial showing that the Magistrate misapplied the law to the facts contained in the record and an award of attorney fees to the Respondent is appropriate.

THIS COURT HEREBY affirms the Findings of Fact, Conclusions Of Law, Judgment And Order entered by the Magistrate on June 7, 1990, and awards the Respondent reasonable attorney fees and costs.

DATED this 24th day of July, 1991.

DENNIS E. GOFF
District Judge

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum Decision And Order is forwarded to the following persons on this 25 day of July, 1991.

Carolyn Seneca Steele
P.O. Box 387
Boise, Idaho 83701

Debra A. Orr
624 3rd St. So.
Nampa, Idaho 83651

Ronald J. Wilper
P.O. Box 640
Caldwell, Idaho 83606

Jeff Not Help Him
P.O. Box 258
Oglala, South Dakota 57764

Jeannine C. Ferguson
P.O. Box 1116
Caldwell, Idaho 83606-1116

Gary D. DeMeyer
Magistrate Judge
Canyon County Courthouse
1115 Albany Street
Caldwell, Idaho 83605

Dan Kessler
Trial Court Administrator
Canyon County Courthouse
Caldwell, Idaho 83605

CLERK OF THE DISTRICT COURT
T RANDALL
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON MAGISTRATE DIVISION

IN THE INTEREST OF:	)	Case No. SP-90-00106*C
	)	
BABY BOY DAVIS,	)	
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
A Minor Child.	)	AND ORDER
	)	
	)	

The above entitled matter having come on for trial on the 21st day of May, 1989, with the petitioners appearing in person and through their attorney, Carolyn Seneca Steele, the above named child did not appear but the attorney for the child Ronald Wilper did appear, Jeff Nothelphim did not appear but he was represented by the Law Office of Van W. Bishop, the Public Defender's Office for Canyon County, Idaho and the Intervenor the Oglala Sioux Tribe, appeared through its attorney, Jeannine Ferguson and the Court having heard the evidence of the parties and the argument of counsel now enters the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That baby boy Davis born September 18, 1989 in Healdsburg, Sonoma County, California is the child of Jeff Nothelphim and Brenda Davis.

2. That baby boy Davis has resided with the petitioners since September 21, 1989 and at the date of the trial resided in Canyon County, Idaho.

3. That Jeff Nothelphim is a member of the Oglala Sioux Indian tribe but the mother is not.

4. Jeff Nothelphim failed to appear at the trial in this matter and despite letters directed to him from the Public Defender's office

he declined to participate. Jeff Nothelphim was served with notice of the petition to terminate his parental rights and of the hearing.

5. Jeff Nothelphim has had no contact with baby boy Davis, has not paid any support for the child, has not sought to have any contact with the child, nor has he paid any of the prenatal or birthing expenses related to the child.

6. Brenda Davis and Jeff Nothelphim were not married and the evidence indicates that the only contact Brenda Davis had with the Oglala Sioux Reservation in Pine Ridge, South Dakota was a visit on Labor Day Weekend in 1988 for a period of four days.

7. Jeff Nothelphim is the father of four other minor children none of which reside on the Pine Ridge Reservation. Those Children being Sara Elizabeth Nothelphim born May 12, 1980, Tyler Nothelphim born, April 20, 1982, Nicholas Nothelphim, born August 15, 1985 and Ryan Nothelphim born November 24, 1986.

8. Neither Jeff Nothelphim nor any of his extended family members have maintained contact with nor attempted to impart any of the Sioux cultural values to any of the children of Jeff Nothelphim. Nor has any member of his family or the Sioux tribe provided any financial assistance to the mother of Tyler, Nicholas and Ryan since her divorce from Jeff Nothelphim. The lack of support and contact by Jeff Nothelphim and his extended family members with Tyler, Nicholas, and Ryan have had detrimental emotional effects on those children.

9. Brenda Davis has consented to the termination of her parental rights and the adoption of Baby Boy Davis by the petitioners.

10. Baby Boy Davis has had no contact with Jeff Nothelphim the extended family of Jeff Nothelphim or any member of the Oglala Sioux Tribe since his birth.

11. Marie Lone Elk is the sister of Jeff Nothelphim. Marie Lone Elk made one attempt in August of 1989 to call Brenda Davis but other than that sole effort the extended family of Jeff Nothelphim made no other effort to inquire about the condition or well-being of Brenda Davis or the child, Baby Boy Davis.

12. Baby Boy Davis has never been in the custody of any person

other than petitioners and the brief custody of Brenda Davis at the hospital.

13. That intervenors were allowed to intervene in this matter pursuant 25 USCS Sec. 1911(c) and I.R.C.P. Rule 24(a) because Baby Boy Davis may have been an Indian Child as defined in the Indian Child Welfare act.

14. That by affidavit of the Oglala Sioux Tribal Enrollment Director, Joan Decker, she stated that the Oglala Sioux Tribe was unable to determine if Baby Boy Davis was a member of the Tribe or eligible for membership in the Tribe.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and jurisdiction of the subject matter as Baby Boy Davis resides in Canyon County Idaho. I.C. Sec. 16-2004 & 16-2006.

2. The provisions of the Indian Child Welfare Act of 1978, 25 U.S.C.S. Sec. 1901, et seq., as to the degree of proof and type of evidence required for the termination of the parental rights of Jeff Nothelphim do not apply to this proceeding.

3. An "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. 25 USCS Sec. 1903(4).

4. The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive. Department of the Interior, Bureau of Indian Affairs, "Guidelines for State Courts; Indian Child Custody Proceedings" Sec. B.1(b)(1) as published in the Federal Register, Vol. 44, No. 228, Monday, November 26, 1979.

5. The Oglala Sioux Tribe has declined to find that Baby Boy Davis is either eligible for membership in that Tribe or that Baby Boy Davis is a member of that Tribe. Their determination is conclusive and therefore Baby Boy Davis is not an Indian Child as defined in 25 USCS Sec. 1903(4) and the Indian Child Welfare Act is not applicable to this proceeding.

6. Even if the Oglala Sioux Tribe had determined that Baby Boy Davis was an Indian Child as defined in 25 USCS 1903(4) "A careful study of the legislative history behind the [Indian Child Welfare] Act and the Act itself discloses that the overriding concern of Congress and the proponents of the Act was the maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment. It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objection of its non-Indian mother." In the Matter of the Adoption of Baby Boy L, 231 Kan. 199, 643 P.2d 168 at 175 (1982); In the Interest of S.A.M., 703 S.W.2d 603 at 608 (Mo.App.1986).

7. Jeff Nothelphim and members of his extended family have never been an "Indian Family" to Baby Boy Davis nor have they even made any effort to create such relationship to Baby Boy Davis or any of the other children of Jeff Nothelphim. "The underlying thread that runs though (sic) the entire Act to the effect that the Act is concerned with removal of Indian children from an existing Indian family unit and the resultant breakup of the Indian family. [T]o apply the Act to the factual situation such as the one before us wold (sic) be to violate the policy and intent of Congress rather than uphold them." Baby Boy L, supra at 175; Interest of S.A.M., supra at 608.

8. Neither the Oglala Sioux Tribe nor the extended family of Baby Boy Davis have ever sought to create or maintain an Indian Family or impart the Oglala Sioux Cultural heritage to Tyler, Nicholas or Ryan Nothelphim since the divorce of their mother from Jeff Nothelphim.

9. Grounds for termination of the parent-child relationship must be proven by clear and convincing evidence. I.C. Sec. 16-2009.

10. There is clear and convincing evidence that Jeff Nothelphim has abandoned Baby Boy Davis by having failed to maintain a normal parental relationship with Baby Boy Davis, by failing to provide reasonable support, failing to maintain regular personal contact and

failing to express any desire whatsoever to do so in the future.

11. There is clear and convincing evidence that it would be in the best interest of Baby Boy Davis and Jeff Nothelphim that the parental rights of Jeff Nothelphim to Baby Boy Davis be terminated.

ORDER

IT IS ORDERED AND THIS DOES HEREBY ORDER That the parent and child relationship existing between Baby Boy Davis and Jeff Nothelphim is hereby terminated.

Dated this 7th day of June, 1990.

Gary D. DeMeyer
Magistrate Judge

I HEREBY CERTIFY that true and correct copies of the above foregoing Findings of Fact, Conclusions of Law and Order were mailed to the following, on or about the 7th day of June, 1990.

Carolyn Seneca Steele
Attorney at Law
P.O. Box 387
Boise, Idaho 83701

Ronald J. Wilper
Attorney at Law
P.O. Box 640
Caldwell, Idaho 83606-0640

Jeanine Ferguson
Attorney at Law
317 Happy Day Blvd., Suite 101
P.O. Box 1116
Caldwell, Idaho 83606-1116

Van G. Bishop
Canyon County Public Defender
624 Third Street South
Nampa, Idaho 83651

Dated this 7th day of June, 1990.

MM
Deputy Clerk

Supreme Court, U.S.
FILED
JUL 21 1993
OFFICE OF THE CLERK

(3)

No. 93-18

In The

Supreme Court of the United States

October Term, 1993

LELAND AND KARLA SWENSON,

Petitioners,

v.

OGLALA SIOUX TRIBE,

Respondent.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

HOWARD A. BELODOFF
Counsel of Record
Idaho Legal Aid Services, Inc.
P.O. Box 913
Boise, Idaho 83701
(208) 336-8980

ROBERT J. MCCARTHY
Idaho Legal Aid Services, Inc.
P.O. Box 973
Lewiston, Idaho 83501
(208) 743-1556

Counsel for Respondent

July, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Does the Indian Child Welfare Act permit a state court to determine that the Act applies to a child custody proceeding when the child's Indian tribe has not yet made a final determination as to whether the child is enrollable?

2. Does the Indian Child Welfare Act apply to the involuntary termination of parental rights of an Indian father, and the placement of an Indian child born out of wedlock to a non-Indian mother, who immediately after birth placed the child with non-Indian parents and voluntarily terminated her parental rights?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 8

I. THE IDAHO SUPREME COURT DID NOT INTERFERE WITH A TRIBE'S INTERNAL PROCESSES REGARDING WHETHER A CHILD IS OR IS NOT ELIGIBLE FOR MEMBERSHIP 8

II. THE IDAHO SUPREME COURT IS IN ACCORD WITH THE UNITED STATES SUPREME COURT AND WITH STATE COURTS OF LAST RESORT IN RULING THAT THE ICWA APPLIES TO THE INVOLUNTARY TERMINATION OF PARENTAL RIGHTS OF AN INDIAN FATHER AND THE PLACEMENT OF AN INDIAN CHILD WITH NON-INDIAN PARENTS WITHIN A FEW DAYS OF THE CHILD'S BIRTH 16

CONCLUSION 29

APPENDIX

Notice to Parent 1a

Order of Adoption 2a

Constitution and Bylaws of the Oglala Sioux Tribe 5a

June 12, 1992, Certificate of Enrollment 7a

TABLE OF AUTHORITIES

Page

CASES:

Alaska Pacific Fisheries Co. v. United States, 248 U.S. 78 (1918) 29

Andrus v. Glover Constr. Co., 446 U.S. 608 (1980) 24

Application of Angus, 655 P.2d 208 (Or. App. 1982), *rev. denied*, 660 P.2d 683, *cert denied sub. nom. Woodruff v. Angus* 464 U.S. 830 (1983) 14

Claymore v. Serr, 405 N.W.2d 650 (S.D. 1987) 22

Ex parte Pero, 99 F.2d 28 (7th Cir. 1938), *cert. denied*, 306 U.S. 643 (1938) 10

In re Adoption of Halloway, 732 P.2d 962 (Utah 1986) 19, 24

In re Adoption of Lindsay C., 280 Cal. Rptr. 194 (Cal. -Ct. App. 1991) 20, 21

In re Adoption of M., 832 P.2d 518 (Wash. Ct. App. 1992) 26

In re Crystal K., 276 Cal. Rptr. 619 (Cal. Ct. App. 1990) 21

In re D.M.J., 741 P.2d 1386 (Okla. 1985) 27

In re Junious M., 193 Cal. Rptr. 40 (Cal. Ct. App. 1983) 20

In re Kahlen W., 285 Cal. Rptr. 507 (Cal. App. 5 Dist. 1991) 15

Matter of Adoption of a Child of Indian Heritage, 543 A.2d 925 (N.J. 1988) 14, 24

Matter of Adoption of Baade, 462 N.W. 2d 485 (S.D. 1990) 22

TABLE OF AUTHORITIES – Continued

Page

Matter of Adoption of Baby Boy D, 742 P.2d 1059 (Okla. 1985) 27

Matter of Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982) 16, 22, 24, 25

Matter of Adoption of Crews, 825 P.2d 305 (Wash. 1992) 25, 26

Matter of Adoption of T.N.F., 781 P.2d 973 (Alaska 1989), *cert denied, sub nom. Jasso v. Finney*, 490 U.S. 1030 (1990) 21

Matter of Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988), *cert denied, sub nom., J.Q. v. D.R.L.* 490 U.S. 1069 (1989) 27

Matter of Coconino County Juvenile Action No. J-10175, 736 P.2d 829 (Ariz. Ct. App. 1987) 24

Matter of S.C., 833 P.2d 1249 (Okla. 1992) 27

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) ..... *passim*

Quinn v. Walters, 845 P.2d 206 (Or. Ct. App. 1993) 22

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 11

United States v. Antelope, 430 U.S. 641 (1977) 10

MISCELLANEOUS:

Constitution and Bylaws of the Oglala Sioux Tribe of the Pine Ridge Reservation of South Dakota, Article II, Section 1 12

TABLE OF AUTHORITIES – Continued

Page

Department of Interior, Bureau of Indian Affairs, "Guidelines for State Courts: Indian Child Custody Proceedings," (hereinafter BIA Guidelines) Fed. Reg. Vol. 44, No. 228, Monday, November 26, 1979 ..... *passim*

Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901, *et seq.* ..... *passim*

Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 11

No. 93-18

In The

Supreme Court of the United States

October Term, 1993

LELAND AND KARLA SWENSON,

Petitioners,

v.

OGLALA SIOUX TRIBE,

Respondent.

On Petition For Writ Of Certiorari
To The Idaho Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Baby Boy Doe (hereinafter child) was born on September 18, 1989. (9sa.)[1] The parents, Brenda Davis and Jeff Not Help Him, have never been married. (2a.) Jeff Not Help Him is an enrolled member of the Oglala Sioux Tribe (hereinafter Tribe). (3sa.) At the time of the birth the father resided, and continues to live and own land, on the

[1] References to the Petitioners' Appendix and Supplemental Appendix to the Petition for Certiorari are denoted by a page number followed by "a" and "sa" respectively. References to the record are denoted as "R" followed by a page number.

Pine Ridge Reservation in Pine Ridge, South Dakota.[2] Brenda Davis is non-Indian. (2a.) Petitioners, Leland and Carla Swenson, are non-Indians who, on September 21, 1989, obtained physical custody of the child from the child's mother and transported him to Idaho without the knowledge and consent of Jeff Not Help Him. (2a.) The mother and the Petitioners kept the birth of the child, their place of residence, and the consent to adopt the child from the father and Tribe for four months following the birth.[3]

---

[2] The Petitioners' assertion that the father had left the reservation many years before is misleading. (Pet'r Pet. at 10.) While it was true that he had resided off the reservation to attend school for several years, he was a resident at the time of the birth of the child and continued to own land on the reservation. The Petitioners' assertions regarding the father's other children's contact with him, his family, or tribe are false. The testimony at the hearing was that the children had stayed with the father and his family on the reservation and that after the family left, repeated attempts by the family were made to keep in contact with them. The family offered to take the children, who resided in Utah, for the summer so they could be exposed to the Indian culture. However, these attempts were repeatedly denied or discouraged by the father's estranged ex-wife. (Tr. 108-9.) The ex-wife eventually remarried and did not notify the family of her new name or address. (Tr. 140-142.)

[3] The Petitioners have misstated the facts which were presented at trial. (*See* Pet'r Pet., 10-11.) The mother never testified in the parental termination proceeding. There was no testimony regarding how she selected the adoptive parents. The child's aunt testified that she and the child's other aunt attempted more than once to telephone the mother in the month preceding the birth after they learned she was not going to keep the child. (Tr. 107-8.) The family wanted to tell the mother that they would take the child to live with them. (Tr. 107.) The mother refused to take or return the telephone calls and the family was only told the mother had moved to California.

On October 11, 1989, the mother, while living in California, signed a Consent to Adoption and a Termination of Parental Rights, which were filed with the trial court on October 27, 1989. (R. 4-5.) The mother consented to the complete termination of her parental rights and waived her right to a hearing. On January 18, 1990, the Petitioners filed a Petition to terminate the parental rights of Jeff Not Help Him. (R. 1-3.) On January 18, 1990, the Petitioners served a Notice to Tribe, pursuant to the Indian Child Welfare Act, 25 U.S.C. § 1901, *et seq.* (hereinafter ICWA), notifying the Tribe that the child may be an eligible member and that the Petitioners were seeking to adopt him. On January 18, 1990, the Petitioners served the father with a Notice to Parent, pursuant to ICWA, at his residence in Oglala, South Dakota. (Resp't. App. 1a.) The notice was the first time the father was notified that the Petitioners had custody of the child in Idaho and were seeking to adopt the child.

Less than three weeks later, on February 8, 1990, a representative of the Tribe's Indian Child Welfare Center appeared at a hearing and advised the Court that the father wanted custody of the child and that the Tribe wanted to intervene and have the proceedings transferred to tribal court pursuant to the ICWA. (3a.) (R. 13-15.) On February 9, 1990, Petitioners' counsel, on behalf of the mother, filed a formal objection to the transfer of the proceedings to the Pine Ridge Tribal Court pursuant to the ICWA, 25 U.S.C. § 1911(b). (R. 16.)

On April 4, 1990, the Tribe filed amended motions to intervene and to transfer the proceedings to the Oglala Sioux Tribal Court on the grounds that the child was an "Indian child" as defined by the ICWA and "he is eligible for membership in the Oglala Sioux Tribe because his

natural father, Jeffrey Not Help Him, Pine Ridge, South Dakota, is a full-blood Oglala Sioux and he is enrolled with the number U-21740." (R. 41-44.) On May 3, 1990, the trial court granted the Tribe the right to intervene under 25 U.S.C. § 1911(c). (3a.) The trial court also indicated the proceeding would be governed by the ICWA based upon a letter from the enrollment director that the father had applied to enroll the child. (3a.) The trial court found that the letter "was a determination by the tribe that the child was eligible for membership in the tribe." (3a.) On May 21, 1990, the trial court heard testimony solely regarding the termination of the father's parental rights. (3a.) The Tribe presented testimony regarding their plan to place the child for adoption with his paternal aunt and uncle, who were tribal members living on the reservation. (3a-4a.) The Tribe argued that the ICWA applied to the termination proceeding and the child should be placed within the tribal community. (3a-4a.)

On June 7, 1990, the trial court ruled that although the father was a tribal member, "the child was not an 'Indian child' as defined in ICWA, because the child was not eligible for membership in the tribe." (4a.) The trial court held that the ICWA did not govern the proceedings and terminated the father's parental rights without applying the requirements of the ICWA. (4a.) The trial court relied upon the BIA Guidelines which "advise state courts to treat determination by an Indian Tribe regarding eligibility for membership in the tribe as conclusive." (4a.)[4] The trial court, construing an affidavit from the

---

[4] *See* Department of Interior, Bureau of Indian Affairs, "Guidelines for State Courts: Indian Child Custody Proceedings," (hereinafter BIA Guidelines) Fed. Reg. Vol. 44, No. 228,

enrollment director on the father's enrollment application for the child, held that the Tribe had declined to find the child eligible for membership and this meant the Tribe had conclusively determined the child was not eligible for membership. (4a.) The trial court concluded that pursuant to the BIA Guidelines, the Tribe's failure to make a final determination regarding eligibility for enrollment was conclusive and the ICWA was not applicable to the proceedings. (4a.)

The trial court also adopted an alternative legal theory, the "existing Indian family" test, to support its ruling that the ICWA did not apply to the termination proceeding. (4a.) The trial court ruled the ICWA only applied where an Indian child was removed from an existing Indian family. (4a.) The trial court concluded that even if the child met the definition of "Indian child," the "ICWA did not apply where a child had never lived within the Indian community or had never been exposed to Indian culture." (4a.) The trial court found that in this case the child had not been removed from an existing Indian family because the child's mother, a non-Indian, had given physical custody to the non-Indian adoptive parents since birth. (4a-5a.) This finding was made despite the fact that the mother had concealed herself in California, had given consent to adoption, and given up physical custody to the Petitioners without the father's knowledge or consent, and never sought to establish a legal guardianship for the child.

Monday, November 26, 1979. The BIA Guidelines are the Department's interpretation of the ICWA and are not binding on state courts. *Id.* at 67584.

The trial court ignored the fact that less than three weeks had passed after the Petitioners served notice of the placement before the tribal representative traveled from South Dakota to Idaho in order to assert the father's and Tribe's right to custody and notified the court of the plans to place the Indian child with his aunt and uncle on the reservation. *See supra*, at 2. On June 7, 1990, the trial court entered an order terminating the parental rights of the father, rejecting the applicability of the ICWA, and employing the state's clear and convincing evidence standard rather than the beyond a reasonable doubt standard under the ICWA. 25 U.S.C. § 1912(f). (14a.)

The Petitioners' assertion that the hearings on the petition to terminate parental rights and the adoption were voluntary and consolidated by the trial court and their presentation of the issues at the termination hearing are incorrect. The termination of parental rights and the adoption hearings were completely separate involuntary proceedings. On June 19, 1990, the trial court held an adoption hearing in which the Tribe was not represented nor given the opportunity to present evidence. (14a.) The trial court never addressed the preferences for adoptive placement. *See* 25 U.S.C. § 1915(a). (14a.)[5] The trial court

---

[5] The Respondent finds the Petitioners' assertion that the Tribe's counsel's prior presentation at the termination proceeding and their subsequent presence at the adoption hearing after the trial court's ruling that the ICWA was inapplicable to the parental termination proceeding gave the Tribe an opportunity to present evidence of the ICWA placement preferences in the adoption proceeding disingenuous. It was the Petitioners who successfully argued on appeal to the district court that attorney's fees should be awarded because of the Tribe's continuing assertion that the ICWA applied to the case was frivolous, unreasonable, and without foundation. (4a-5a.)

also failed to apply the ICWA's preference standard pursuant to 25 U.S.C. § 1915(d) of, "the prevailing social and cultural standards of the Indian community in which the parent or extended family resides with which the parent or extended family members maintain social and cultural ties." (Resp't App. 2a-4a.)

The Tribe appealed the trial court's decision to the district court. (5a.) The district judge affirmed the trial court but on different grounds. (5a.) "The district judge held the child was not an Indian child because there was insufficient proof of paternity in the record to support a finding that the child was a legal child of the father." (5a.) The district judge awarded the Petitioners $8,500 in attorney's fees and costs finding that the Tribe's continuing arguments on appeal that the ICWA had to be applied were frivolous, unreasonable, and without foundation. (5a.)

The Idaho Supreme Court found that the record contained sufficient evidence to establish the Indian child's eligibility for membership as well as the father's paternity. (10a.) The court held that if a state court does not have a conclusive determination from the tribe or the BIA, the trial court must make its own determination regarding the child's eligibility for tribal membership for purposes of the ICWA. (11a.) The court, relying on this Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), rejected the judicially created exception of an existing Indian family requirement under the circumstances present in this case. (12a.) The Idaho Supreme Court vacated the termination order, and remanded the case to the trial court for further proceedings to comply with the ICWA. (15a.)

REASONS FOR DENYING THE WRIT

I. THE IDAHO SUPREME COURT DID NOT INTERFERE WITH A TRIBE'S INTERNAL PROCESSES REGARDING WHETHER A CHILD IS OR IS NOT ELIGIBLE FOR MEMBERSHIP.

The ICWA was enacted in recognition of the federal government's responsibility to the Indian people "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families. . . . " 25 U.S.C. § 1902.[6] Congress recognized the United States' special relationship with and federal responsibility to Indian people finding "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children. . . . " 25 U.S.C. § 1901(3). Congress further recognized that by sanctioning the separation of Indian children from their ancestral peoples and lands, states were eroding the foundation of tribal existence. "[T]he States . . . often fail to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in the Indian communities and families." 25 U.S.C. § 1901(5). Separations of Indian children from their parents and tribes by the states

---

[6] 25 U.S.C. § 1902 specifically states:

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

are no less effective at destroying tribal life than the brutal massacres of the past.

Part of the protection to be accorded Indian children pursuant to the federal government's "special relationship" with the Indian tribes is the assurance that Indian children will not be kept apart from their Indian families and culture and placed or adopted into a non-Indian environment. The Congressional policy in addressing this problem is perhaps the most clearly stated in the BIA Guidelines for application of the ICWA:

> (1) Congress through the Indian Child Welfare Act has expressed its clear preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own families or Indian tribes. Proceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in an individual case contrary to these preferences. The Indian Child Welfare Act, the federal regulations implementing the Act, the recommended guidelines and any state statutes, regulations or rules promulgated to implement the Act shall be liberally construed in favor of a result that is consistent with these preferences. Any ambiguities in any of such statutes, regulations, rules or guidelines shall be resolved in favor of the result that is most consistent with these preferences.

Id. at 67585-86, A.*Policy*.

The ICWA defines an Indian child as an unmarried person under eighteen years of age who is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a

member of an Indian tribe. 25 U.S.C. § 1903(4). Congress' use of the terms "member" and "membership" in the ICWA rather than the terms "enrollment" is purposeful. While enrollment in a tribe is the most commonly used criteria for membership, it is not the only one.[7] Maintaining tribal relations and being recognized as an Indian by the community have also been used to determine membership. *Ex parte Pero*, 99 F.2d 28, 30 (7th Cir. 1938), *cert. denied*, 306 U.S. 643 (1938); *see United States v. Antelope*, 430 U.S. 641, 646 (1977). Therefore, if it is determined that an Indian child or parent is not enrolled in a tribe, an investigation must still be made into whether they can be considered a member of the tribe.[8]

---

[7] "Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls that list only persons that were members as of a certain date. Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative. *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979)." BIA Guidelines, 44 Fed. Reg. 67586 B.1. Commentary.

[8] BIA Guidelines at B.1.(c) in part states:

> (c) Circumstances under which a state court has reason to believe a child involved in a child custody proceeding is an Indian include but are not limited to the following:
>
> (i) Any party to the case, Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child.
>
> (ii) Any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child.
>
> . . . .
>
> (iv) The residence or the domicile of the child, his or her biological parents, or the Indian custodian

The Idaho Supreme Court ruling correctly applied the "Indian child" requirement of the ICWA and did not interfere with a tribe's internal processes regarding membership. As explained by the court, a factual determination that a child is eligible for membership in a tribe, and thus comes within the protection of ICWA, in no way obligates the tribe to enroll the child. The Petitioners' argument equates enrollment with membership. The Idaho Supreme Court, at 10a, carefully distinguished "eligibility for membership" from the administrative function of "enrollment."

> If a state court does not have a conclusive determination from the tribe or the BIA regarding a child's eligibility for tribal membership, the trial court must make its own determination regarding the child's eligibility for tribal membership.

Indeed, the very case upon which Petitioners rely, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), ensures that a state court cannot impose its determination on a tribe to require enrollment. This Court held in *Santa Clara Pueblo* that the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341, was not a Congressional waiver of tribal immunity from suit in federal court. *Id.* at 59. This Court also noted that Congress has plenary authority to modify tribal powers of local self-government. *Id.* at 56. The Court in no way implied that through legislation, such as ICWA, Congress may not permit state courts to make

---

is known by the court to be or is shown to be a predominantly Indian community.

factual and legal findings regarding a child's eligibility for tribal membership, for purposes of applying the protection of ICWA to the child and to the tribe. Rather, this Court stated that "the *judiciary* should not rush to create *causes of action* that would intrude on . . . [a] tribe's right to define its own membership *for tribal purposes.*" *Id.* at 72, n.32 (emphasis added).

There can be no dispute in this case that the Tribe considers the child in fact eligible for membership.[9] The Idaho Supreme Court found the evidence clearly established the child's eligibility for membership. The Idaho Supreme Court correctly refused, as argued by the Petitioners, to read the ICWA and the BIA Guidelines as imposing "a requirement that a tribe reach a conclusive determination regarding a child's eligibility for membership as a prerequisite to application of ICWA." (10a.) The Idaho Supreme Court held that the enrollment director's affidavit was "clearly not a 'determination' as intended by the BIA guidelines." (10a.) The Idaho Supreme Court found "[t]here was no evidence in the record to support a finding that the tribe determined the child is not eligible for tribal membership" despite the Petitioners' continued assertion to the contrary. The Idaho Supreme Court noted that the affidavit of the Tribe's enrollment director did not state that the child was ineligible for membership, but

---

[9] The Constitution of the Oglala Sioux Tribe states that:

> The membership of the Oglala Sioux Tribe shall consist as follows: . . . (b) All children born to any member of the tribe who is a resident of the reservation at the time of the birth of said children.

Constitution and Bylaws of the Oglala Sioux Tribe of the Pine Ridge Reservation of South Dakota, Article II, Section 1. *See* Respondent's Appendix at 5a.

rather that although the father met the primary considerations for enrollment, that is residency and land ownership, the enrollment committee lacked the documentation necessary, a birth certificate from the mother, to proceed with the application and the vote to make a conclusive determination of eligibility for enrollment at that time. (10a-11a.)

The plain intent of Congress as expressed in the ICWA was to include within its protection a child who is "eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). Congress included *both* children who are members of a tribe and those who are eligible for membership and have a biological parent who is a member of a tribe. The definition of "Indian child" used by Congress ensures broad application of the ICWA protections rather than restricting them to a short time frame or subject them to the actions of a non-Indian parent who may seek to circumvent the substantive and procedural provisions.

The impediments which prevented the enrollment of the child were not caused by the Tribe and could not be overcome in the short time before the termination hearing, if at all, considering the mother's and the Petitioners' attitudes toward the Tribe and an adoption by an Indian family living on the reservation. Congress recognized and anticipated that circumstances would arise where a natural parent's failure to cooperate would prevent completion of an enrollment application or final decision being made because it defined "Indian child" as being either a member or eligible for membership. A narrower definition requiring enrollment would be inconsistent with the Congressional intent to preserve Indian tribes by preventing the separation of Indian children from their tribes and

culture. To permit the natural mother's prevention of enrollment as a basis for a state court decision that the ICWA is inapplicable because a child is not an "Indian child" until an enrollment determination can be made also runs counter to the *Holyfield* rule that the ICWA is not to be circumvented due to mere technicalities. *Holyfield*, at 49. The child has since been enrolled. *See* Respondent's Appendix 6a-7a, June 12, 1992, Certificate of Enrollment.

The Idaho Supreme Court decision is supported by several state court opinions which have noted the obligation of the trial court to determine whether the child is an "Indian child" by considering the evidence which can realistically be provided by the tribe rather than relying solely on a final administrative determination on enrollment.

In *Matter of Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988), the Supreme Court of New Jersey held that a tribe's refusal to enroll a child as a member of the tribe is not determinative of the child's status as an "Indian child" under the ICWA. The court ruled ICWA would still apply where the tribe's decision was based on uncertain ancestry because at the time an affidavit of paternity had not been filed. The court held, that "the tribe's current refusal to enroll Baby Larry is not determinative of his status as an Indian child under the ICWA" and "we are satisfied that Congress intended that a child's eligibility for tribal membership be a question of fact dependent on his or her actual ancestry." *Id.* at 933.

In *Application of Angus*, 655 P.2d 208 (Or. App. 1982), *rev. denied*, 660 P.2d 683, *cert denied sub. nom. Woodruff v. Angus* 464 U.S. 830 (1983), the Oregon Court of Appeals upheld a trial court's finding that the ICWA applied to a

child custody proceeding when the father was a member of a tribe and the child was found by the trial court to have met the tribe's membership requirements, although not formally enrolled at the time of the proceeding. The court held since formal membership requirements may differ between tribes, "[t]here is thus no one method of proof of membership, but the testimony of a representative of tribal government would be probative evidence of membership." *Id.* at 212.

In *In re Kahlen W.*, 285 Cal. Rptr. 507 (Cal. App. 5th Dist. 1991), the California Court of Appeals held that a tribal determination of enrollment is not required to establish "Indian child status" for purposes of applying the ICWA. *Id.* at 513. The court also ruled that the parent's failure to provide an enrollment number in the tribe is irrelevant, noting that "[p]arents are not necessarily knowledgeable about tribal government or membership and their interests may diverge from those of the tribe and those of each other." *Id.* at 513. The court noted further that enrollment is not the only means of establishing Indian status. *Id.* at 513-14. Finally, the court recognized that a child has an "independent right" which must be protected regardless of her mother's action or inaction, because the ICWA is based on a presumption that the best interests of the child is not to be separated from the tribe. *Id.* at 514.

The Idaho Supreme Court decision recognized and strictly applied the procedural requirements and substantive provisions of the ICWA as expressed by Congress. The court did not violate principles of tribal sovereignty or interfere with the Tribe's internal processing regarding membership. The Idaho Supreme Court's decision was

completely in accord with the views expressed by the Tribe in this case.

II. THE IDAHO SUPREME COURT IS IN ACCORD WITH THE UNITED STATES SUPREME COURT AND WITH STATE COURTS OF LAST RESORT IN RULING THAT THE ICWA APPLIES TO THE INVOLUNTARY TERMINATION OF PARENTAL RIGHTS OF AN INDIAN FATHER AND THE PLACEMENT OF AN INDIAN CHILD WITH NON-INDIAN PARENTS WITHIN A FEW DAYS OF THE CHILD'S BIRTH.

The Petitioners are requesting that the Court distinguish between Indian children who have already been a part of an Indian family, and those who, whether from circumstances of birthplace or parental subterfuge, have never lived with their Indian family or tribe. Some courts in the past have reached conflicting decisions on the question of whether or not this "existing Indian family" requirement is a valid one.

In *Matter of Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982), the court held that ICWA does not apply to "an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be." The court viewed the ICWA as being concerned only with "removal of Indian children from an existing Indian family unit." *Id.* at 175.

The Idaho Supreme Court rejected the trial court's conclusions that because the child was not being removed from an existing Indian family and had never lived within the Indian community or been exposed to the Indian culture since his birth, the ICWA did not apply in this case. (4a-5a.) The Idaho Supreme Court, at 12a,

refused to apply the existing Indian family requirement because:

> In this case, application of an Indian family requirement would allow the non-Indian mother to circumvent application of ICWA and the tribe's interest in the child by making sure that the child is kept away from the reservation and out of contact with the father and his family. This would undermine the tribe's interest in its Indian children, which the Supreme Court recognized in *Mississippi Choctaw*.

The Idaho Supreme Court decision is in agreement with a separate and more recent line of cases rejecting the "existing Indian family" exeception. The court held that Congress had specifically limited a state court's power to circumvent the protective procedures and evidentiary standards contained in the ICWA for Indian children. (12a.) The court held it to be "inappropriate to use a judicially created exception to circumvent the mandates of ICWA." (12a.)

The Idaho Supreme Court was concerned that a non-Indian parent could circumvent the ICWA *and* the tribe's interest in the child by making sure the child was kept away from the reservation and out of contact with the Indian parent and family. (12a.) Their concerns were justified in the present case because the mother rebuffed the father's family's attempts to contact her prior to the child's birth in order to take custody of the child after they learned the baby would be placed for adoption. The mother moved to California to have the baby so as to avoid the Indian family and secretly made arrangements to have the Petitioners adopt the child. The first knowledge the Tribe, the father, or his family had of the child's whereabouts was when they received notice four months

later that the Petitioners had filed a parental termination proceeding in Idaho.

In *Holyfield*, 490 U.S. at 54, this Court upheld application of the ICWA even though the children had never lived in an Indian home or on an Indian reservation prior to being placed with non-Indian prospective adoptive parents. The Court was concerned with the jurisdiction of the tribal court, and thus with the domicile of the parents. The Court noted that the ICWA addresses jurisdiction concerning Indian children not domiciled on the reservation by establishing standards for state court proceedings. *Id.* at 36, n.6. Thus, Congress intended the ICWA to apply to children domiciled away from an Indian Tribe, Indian reservation, and, presumably, an Indian extended family.

Holyfield states that "permitting individual members of the tribe to avoid tribal exclusive jurisdiction by the simple expedient of giving birth off the reservation would, to a large extent, nullify the purpose the ICWA was intended to accomplish." *Id.* at 52. Permitting a non-Indian parent to defeat not just tribal jurisdiction, but application of the entire Act by avoiding the tribal environment, would have exactly the same effect.

This Court recognized in *Holyfield* that in enacting the ICWA, "Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians." *Id.* at 49. The Court discussed the underlying objectives of the ICWA which require a recognition of the interest of an Indian tribe in keeping its children, as distinct from the interests of the Indian child's parent, which may differ from the tribe's. The Court specifically adopted the holding of the Utah Supreme Court that "[t]he protection of this tribal

interest is at the core of the Indian Child Welfare Act, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents." 490 U.S. at 52-53, quoting *In re Adoption of Halloway*, 732 P.2d 962, 969-70 (Utah 1986).

A requirement that an Indian child live on the Indian reservation or within an existing Indian family to enjoy the protection of the ICWA, where the child's non-Indian parent may have taken steps to see that the child was placed outside the Indian community at birth, is contrary to the purposes and objectives of the ICWA as construed by this Court in *Holyfield*.[10] This Court recognized that protecting the rights of Indian tribes and Indian children, even where these might be in conflict with the interests of Indian parents, is an important end to be achieved by the ICWA. The Court quoted a state court decision that "[t]he Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." *Id.* at 50 n.24, quoting *In re Appeal in Pima County, Juvenile Action No. S-903*, 635 P.2d 187, 189 (Ariz. 1981). Clearly *Holyfield* would dictate that protecting the rights of the Tribe and the child in this case should prevail even where they are in conflict with the non-Indian mother's desires.

---

[10] This Court, in *Holyfield* at 50, quoted favorably from a 1977 report of the American Indian Policy Review Commission, which stated that separation of Indian children from their tribes "seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children." *Holyfield* makes clear that these evils are to be guarded against in voluntary as well as involuntary removal of Indian children from their cultural setting. *Id.* at 50 and n.25.

In *In re Junious M.*, 193 Cal. Rptr. 40, 46 (Cal. Ct. App. 1983), the court held that a child has the right to develop an Indian identity even where he or she has not, to that time, lived in an Indian home.[11] The Court of Appeals refused to follow the existing Indian family exception and concluded that prior residence within an existing Indian family was not critical to application of the ICWA so long as the child was an Indian child and the child custody proceeding was a proceeding as defined by the ICWA.

The California Court of Appeals recently criticized the rationale which created an "existing Indian family unit" exception to the ICWA when there are "adoption proceedings involving an illegitimate Indian child who has never been a member of an Indian home or Indian culture, and who is being given up by his or her non-Indian mother." *In re Adoption of Lindsay C.*, 280 Cal. Rptr. 194, 198 (Cal. Ct. App. 1991). The California Court noted that "*Holyfield* has raised new questions regarding the continuing viability of *Baby Boy L.* and its progeny."[12] *Id.* at 199.

---

[11] The California Court of Appeals in *Junious M.* held that "[e]ven if judicial creation of exceptions to the Act were permissible, creation of one where the child has been deprived of development of an Indian identity would not be appropriate.... [A] major purpose of the Act would be undermined by such an exception." *Id.*

[12] The court in *Lindsay* reviewed the *Baby Boy L.* decision and the other decisions which had adopted its analysis. The court, citing a law review article, stated:

> As noted, *Holyfield* has raised new questions regarding the continuing viability of *Baby Boy L.* and its progeny. As stated by one legal scholar, "After the decision in *Holyfield*, it appears that the Kansas court in *Baby Boy L.* may have given inappropriate weight to the wishes of the family. The United States

The California Court of Appeals in *Lindsay* also relied heavily on *In re Crystal K.*, 276 Cal. Rptr. 619 (Cal. Ct. App. 1990). The court in *In re Crystal K.* disapproved the "existing Indian family" exception, concluding that any view "(l)imiting the Act's applicability solely to situations where non-family entities physically remove Indian children from actual Indian dwellings depreciates the very links – parental, tribal and cultural – the Act is designed to improve. *Id.* at 625.

In *Matter of Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989), *cert denied, sub nom. Jasso v. Finney*, 490 U.S. 1030 (1990), the Alaska Supreme Court criticized those cases which had recognized an Indian family exception to the ICWA, stating that:

> Reliance on a requirement that the Indian child be part of an Indian family for the Act to apply would undercut the interests of Indian tribes and Indian children themselves that Congress sought to protect through the notice, jurisdiction and other procedural protections set out in ICWA.
>
> . . . .
>
> Moreover, these judicially-created exceptions to the coverage of ICWA are somewhat suspect in light of the Act's purpose of imposing

---

> Supreme Court seems unlikely to protect the *implied* right of the non-Indian mother to entirely exclude the applicability of the Act which *explicitly* protects the right of a tribe to intervene in any child custody proceeding involving an Indian child." (Tellinghuisen, *The Indian Child Welfare Act of 1978: A Practical Guide with [Limited] Commentary* (1989) 34 S.D.L.Rev. 660, 671)

In re Adoption of Lindsay C., supra at 199 (emphasis in original).

> federal procedural safeguards. State courts must be particularly hesitant in creating judicial exceptions to a federal act which was enacted to counter state courts' prejudicial treatment of Indian children and communities.

Id. at 977-78.

In *Matter of Adoption of Baade*, 462 N.W. 2d 485 (S.D. 1990), the South Dakota Supreme Court explicitly rejected the rationale of the *Baby Boy L.* decision and its own earlier opinion in *Claymore v. Serr*, 405 N.W.2d 650 (S.D. 1987), which had adopted an existing Indian family exception. *Id.* at 489. The Court ruled that:

> Consequently, it is incorrect, when assessing ICWA's applicability to a particular case, to focus only upon the interests of an existing family. *See* Note, *The Indian Child Welfare Act of 1978: Does it Apply to the Adoption of an Illegitimate Indian Child?*, 38 Cath. U.L.Rev. 511, 534 (1989). ("In light of the legislative history of the ICWA, the existing Indian family theory is thus contrary to the intent of Congress." (footnotes omitted).) Such a practice fails to recognize the legitimate concerns of the tribe that are protected under the Act. *See* Tellinghuisen, *supra* at 666 ("*Holyfield* also carries the clear message that [ICWA] would be read liberally, perhaps creatively, to protect the rights of the tribe even against the clearly expressed wishes of the parents. . . . ")

Id. at 489-490.

In *Quinn v. Walters*, 845 P.2d 206 (Or. Ct. App. 1993), the court rejected the imposition of an "existing Indian cultural setting" requirement noting that:

> [A]s a matter of *state* law, a requirement to ICWA that *Congress* did not impose; *i.e.*, that a child who meets the ICWA definition of "Indian

> child" is nonetheless not protected by ICWA, unless the child is being removed from an existing Indian cultural setting. (Citation omitted.)
>
> That is directly in conflict with the idea of tribal sovereignty and the policy of improving tribal ties reflected in ICWA. It also involves exactly the type of state court interference that ICWA was intended to protect against. If ICWA does not apply because the parent is not "Indian" enough for a particular state court, the protection afforded to the child, the parents *and the tribe* is defeated.

Id. at 208-09 (emphasis in original).[13]

---

[13] The court in *Quinn* at 209 n.2, further stated its reasons for rejecting the state imposed exceptions:

> If the tribe has a right to intervene, or to assert jurisdiction of its own court, it may well decide that a child who meets the definition of Indian child, although born of parents who are not in an "existing Indian cultural setting," should be returned to the tribe rather than being placed in a non-Indian adoptive home. That is the tribe's, not the state court's, decision. Engrafting a new requirement into ICWA that allows the dominant society to judge whether the parent's cultural background meets its view of what "Indian culture" should be puts the state courts right back into the position from which Congress has removed them. That would be especially ironic, in that one of the reasons that the parents may not be involved in their Indian culture could be the very policies of removal of Indian children that ICWA was intended to counteract. *See Mississippi Band of Choctaw Indians v. Holyfield, supra,* 490 U.S. at 50 n. 25, 109 S.Ct. at 1609 n. 25. If state courts impose their own value system on these decisions, the tribes will never be able to regain members who have been lost because of earlier government policies.

The trend in the cases even prior to *Holyfield* was to not create judicial exceptions to the ICWA. The Arizona Court of Appeals, in *Matter of Coconino County Juvenile Action No. J-10175*, 736 P.2d 829 (Ariz. Ct. App. 1987), refused to dispense with the protections of ICWA simply because the child had not been living in an Indian home. The court held that "[w]hen the Act is read as a whole, it is clear that Congress had made a very strong policy choice that Indian children, including those who have a non-Indian parent, belong to an Indian home." *Id.* at 832. The Utah Supreme Court likewise found the ICWA applicable although the child had been living in a non-Indian environment. *In re Adoption of Halloway*, 732 P.2d 962 (Utah 1986). The New Jersey Supreme Court, in *Matter of the Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988), also held that the ICWA should apply even where the child has never lived with an Indian family or in an Indian environment.

The state courts which have addressed the issue under similar circumstances, especially since *Holyfield*, are thus in accord with the Idaho Supreme Court. This Court should not entertain Petitioners' invitation to create a judicial exception to the application of the ICWA under the circumstances of this case. The only exceptions recognized in the ICWA concern divorce and delinquency proceedings. *See* 25 U.S.C. § 1903. The Court should apply the basic rule of statutory construction which is that express exceptions in a statute exclude all other exceptions. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).

Petitioner argues that *Baby Boy L.* has been followed by the Supreme Courts of the states of Oklahoma and

Indiana, and the Court of Appeals of the State of Missouri. All of the decisions cited by Petitioners pre-date *Holyfield*, with the exception of more recent decisions in Washington and Oklahoma. These decisions are not applicable to the circumstances presented to the Idaho Supreme Court and therefore do not support Petitioners' position that the decisions of these states are in conflict.

The court, in *Matter of Adoption of Crews*, 825 P.2d 305, 311 (Wash. 1992), cautioned that its holding was limited to "the narrow circumstances presented by the facts of this case." The *Crews* decision cites, but does not specifically overturn, a previous ruling of the Washington State Court of Appeals which explicitly rejected the Indian family exception. *Id.* at 310, citing *In re Custody of S.B.R.*, 719 P.2d 154, 156 (Wash. Ct. App. 1986).

In *Crews*, the mother and father, after selecting a private adoption agency, receiving counseling, and selecting the adoptive parents, gave their voluntary consent to the adoption. *Id.* at 307. The application of the ICWA was never an issue prior to the adoption. After the state court approved the adoption the mother attempted to reinstate her parental rights by contending the ICWA should have been applied to the adoption. The mother did not and had never lived on a reservation. *Id.* at 310. She was totally unaware and uninterested in her Indian ancestry until after the adoption became final. *Id.* at 308. Neither the mother nor her family regularly participated in any Indian practices and events. *Id.* at 308.

The Washington Supreme Court, after considering the *Holyfield* decision, decided that the ICWA was not applicable "when an Indian child is not being removed from an Indian cultural setting, the natural parents have no substantive ties to a specific tribe, and neither the

parents nor their families have resided or plan to reside within a tribal reservation. *Crews*, 825 P.2d at 310.

The *Crews* decision does not support the Petitioners since the Tribe intervened in the present action immediately after being notified that the ICWA may be applicable, prior to the involuntary termination of the father's rights. The father is an enrolled tribal member residing on the reservation. The Tribe proposed to place the child on the reservation with his paternal aunt and uncle who are tribal members and active in the traditional and cultural affairs of the Tribe. This case does not meet the criteria established by *Crews* that the parent have no substantive ties "to a specific tribe" and that there are no plans for the child to reside within a reservation.

More recently, the Washington State Court of Appeals affirmed the limited scope and meaning of the *Crews* analysis. The Court of Appeals held that the ICWA applied to a child even though both parents consented to the adoption and the Indian parent had not lived on the reservation since he was a small child. *In re Adoption of M.*, 832 P.2d 518, 519 (Wash. Ct. App. 1992). The Court held that *Crews* was distinguishable because the father, as a child, had been removed from the reservation and placed in a non-Indian home and the "application of the ICWA to M might result in M being placed on the reservation with an Indian aunt." *Id.* at 521-22. The circumstances in the present case are similar to *Adoption of M.* rather than the "narrow circumstances" presented in *Crews*. The father's sister, the child's aunt, and her husband, have anxiously awaited the opportunity to take custody of the child in order to return him to their Indian family and reservation. Therefore the Idaho Supreme

Court decision is consistent with the current interpretations of the ICWA by the appellate courts of Washington State.

The Petitioners' reliance on the decision in *Matter of S.C.*, 833 P.2d 1249 (Okla. 1992) is misplaced because the circumstances of the case are completely different and the legal analysis inapplicable. In *Matter of S.C.*, two Indian children, five and six years old, were removed from their non-Indian mother after criminal child abuse charges were filed against her. *Id.* at 1251. The children were placed in an *Indian* foster home. The mother had never married the Indian father and had retained sole custody of the children since their birth. *Id.* at 1251. The Indian father had little contact with the children. *Id.* at 1252. The father and tribe appeared in the proceeding after receiving notice under the ICWA. *Id.* at 1251. The tribe, after conducting a home study, did not recommend placement with the Indian father but only that he be given visitation rights. *Id.* at 1252. The court held, relying on its prior decision in *In re D.M.J.*, 741 P.2d 1386 (Okla. 1985), that where the children had lived away from their Indian family for years, the ICWA would not be applicable. *Id.* at 1255-56.

The Petitioners rely on cases where the court was asked to apply the ICWA to children who had previously lived for many years with a non-Indian parent outside an Indian environment. *See also Matter of Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988), *cert denied, sub nom., J.Q. v. D.R.L.*, 490 U.S. 1069 (1989), where the child's "entire life of seven years to date has been spent with her non-Indian adoptive parents in a non-Indian culture." *Id.* at 309.

The present case is more closely related to the prior Oklahoma Supreme Court decision in *Matter of Adoption*

of Baby Boy D, 742 P.2d 1059 (Okla. 1985). The court in *Baby Boy D* held the ICWA was applicable to newborn Indian children where the unwed father had acknowledged or established paternity through the tribal courts consistent with tribal custom or state procedures. *Id.* at 1064. In the present action, the Indian father had acknowledged paternity with the Tribe and through state procedures. The Idaho Supreme Court specifically held that paternity had been established. (13a-14a.) There are no state court decisions which sanction an exception to the application of the ICWA where an Indian parent, who has acknowledged paternity, or a tribe soon after the birth sought to place the child within an Indian community. The non-Indian mother and the Petitioners' actions are the sole reason that the child had not been given an opportunity to be part of his Indian culture and environment. The Idaho Supreme Court, at 14a., was correct in not condoning their efforts to avoid the Indian community and application of the ICWA.

> We are acutely aware that more than three years have elapsed since the child was placed with adoptive parents. We understand the difficulty and danger of removing a child of this age from the home in which the child has been nurtured during this formative period. We cannot ignore, however, that the termination of the father's rights and the placement of the child by adoption were accomplished without applying ICWA.

State court decisions requiring an "existing Indian family" before applying ICWA protections are best viewed as limited to a very narrow set of circumstances not present in this case. The overwhelming weight of

authority on the issue agrees with the analysis of the Idaho Supreme Court.

CONCLUSION

The Idaho Supreme Court ruling in this case merely requires state courts to carry out their responsibility under the ICWA to determine the applicability of the Act. The Idaho Supreme Court has followed this Court in rejecting state court exceptions to the application of the ICWA. No state court has advanced any consistent rationale which should cause this Court to reexamine either its own previous ruling in *Holyfield* or the Idaho Supreme Court ruling in this case. Finally, the Idaho court's decision is in accord with the well-established "Indian law" canon of construction adhered to on many occasions by this Court, that "statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 79 (1918). In light of this Court's recognition in *Holyfield* that the ICWA is intended to protect Indian tribes as well as the best interests of Indian children by promoting placement of such children within their tribes and communities, liberal construction of ICWA requires the result reached by the Idaho Supreme Court. *Holyfield*, 490 U.S. at 49-50.

For these reasons, Respondent prays that the petition for certiorari be denied.

Respectfully submitted,

HOWARD A. BELODOFF
Counsel of Record
Idaho Legal Aid Services, Inc.
P.O. Box 913
Boise, Idaho 83701
(208) 336-8980

ROBERT J. MCCARTHY
Idaho Legal Aid Services, Inc.
P.O. Box 973
Lewiston, Idaho 83501
(208) 743-1556

Counsel for Respondents

UNDERWOOD and STEELE Ctd.
CAROLYN SENECA STEELE
605 West Franklin Street
P.O. Box 387
Boise, Idaho 83701
Telephone: (208) 342-6532

IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR
THE COUNTY OF CANYON
MAGISTRATES DIVISION

In the Matter of the Adoption of BABY BOY DAVIS, A Minor Child.	Case No. SP-89-01116 NOTICE TO PARENT (Filed Jan. 18, 1990)

To: Jeff Nothelphim
P.O. Box 258
Oglala, South Dakota 57764

Pursuant to Section 104 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1912 et seq.), and in accordance with the guidelines for State Court-Indian Child Custody Proceedings, published in the Federal Register, 44-FR-228 (1979), petitioners give notice to Jeff Nothelphim of their petition to adopt the above-named child pursuant to I.C. 16-2004 (c) before the Magistrate's Court, Canyon County, State of Idaho, and provides to Jeff Nothelphim the following information:

UNDERWOOD and STEELE Ctd.
CAROLYN SENECA STEELE
605 West Franklin Street
P.O. Box 387
Boise, Idaho 83701
Telephone: (208) 342-6532

Attorneys for Petitioners

IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR
THE COUNTY OF CANYON
MAGISTRATES DIVISION

In the Matter of the Adoption of BABY BOY DAVIS, A Child Under Eighteen Years of Age.	Case No. SP-90-00106 SP-89-01116 ORDER OF ADOPTION (Filed June 19, 1990)

This matter concerning the adoption of BABY BOY DAVIS, came on for hearing before this Court at 11:00 o'clock A.M. on the 14th day of June, 1990, and Leland Swenson and Karla Swenson, husband and wife, having appeared before me in person; and evidence having been introduced and submitted to the Court, the Court enters its findings, conclusions and Order:

I.

That the Petitioners are Leland Swenson and Karla Swenson, husband and wife;

II.

That BABY BOY DAVIS, the child of Brenda Ann Davis and Jeffrey Nothelphim, was born out of wedlock;

III.

That the natural father Jeffrey Nothelphim's parental rights were terminated on the 21st day of May, 1990, in the above-named court;

IV.

That said minor child has lived with and been in the custody and control of the petitioners since September 19, 1989, and that petitioners have provided all of the care and support for said minor child, in the County of Canyon, State of Idaho, since that date;

V.

That the legal name of the said child shall be KENNETH CASEY LEON SWENSON;

VI.

That the petitioners herein agree to adopt said child and to give said child all the rights and privileges he is

entitled to as the lawful child of the petitioners including the rights of inheritance;

VII.

That the petitioners have the means and ability to properly support and care for said child, all to the child's benefit.

WHEREFORE, IT IS ORDERED AND DECREED and this does ORDER AND DECREE:

That said adoption is in the best interest of the above-named minor child and that said minor child is hereby and shall henceforth be regarded as legally adopted by Leland and Karla Swenson and shall be regarded and treated in all respects as the lawful child of Leland and Karla Swenson, husband and wife, and that henceforth the said minor child, BABY BOY DAVIS, shall be known as KENNETH CASEY LEON SWENSON, and that the said petitioners, Leland and Karla Swenson and the said minor child Kenneth Casey Leon Swenson shall sustain toward each other the legal relationship of parent and child, subject to all duties and rights of that relationship, including the rights of inheritance, support and protection.

DATED this 14th day of June, 1990.

/s/ Gary D. DeMeyer
Gary D. DeMeyer, Magistrate

CONSTITUTION AND BY-LAWS OF THE OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION OF SOUTH DAKOTA

Preamble

We, the Oglala Sioux Tribe of the Pine Ridge Indian Reservation, in order to establish a more Perfect organization, Promote the general welfare, conserve and develop our lands and resources, secure to ourselves and our posterity the power to exercise certain rights of home rule not inconsistent with federal laws and our treaties, and in recognition of God Almighty and His Divine Providence, do ordain and establish this constitution for the Oglala Sioux Tribe.

Article 1 – Territory

The jurisdiction of the Oglala Sioux Tribe of Indians shall extend to the territory within the original confines of the Pine Ridge Indian Reservation Boundaries, as defined by the act of March 2, 1889 (25 Stat. L. 888), and to such other lands as may be hereafter added thereto under any law of the United States except as may be otherwise provided by law for unrestricted lands.

Article II – Membership

Section 1. The membership of the Oglala Sioux Tribe shall consist as follows:

(a) All persons whose names appear on the official census roll of the Oglala Sioux Tribe of the Pine Ridge Reservation as of April 1, 1935, provided, that correction may be made in the said rolls within five years from the

adoption and approval of this constitution by the tribal council subject to the approval of the Secretary of Interior.

(b) All children born to any member of the tribe who is a resident of the reservation at the time of the birth of said children.

Section 2. The tribal council shall propose by-laws covering future membership and the adoption of new members.

Oglala Sioux Tribe

Department of Enrollment

Box H
Pine Ridge, South Dakota 57770-2070
Phone 605/867-1321 Ext. 244

June 12, 1992

I HEREBY CERTIFY THAT ALEX DAVIS (AKA BABY BOY DAVIS), IS LISTED ON THE PINE RIDGE INDIAN RESERVATION CENSUS LEDGER, ESTABLISHED 1908 (revised 1956), AN OFFICIAL RECORD OF THIS AGENCY, AS BEING ½ DEGREE OGLALA SIOUX INDIAN BLOOD, WITH ROLL NO. U-33586 AND WAS BORN SEPTEMBER 18, 1989 IN HEALDSBURT, CALIFORNIA TO BRENDA DAVIS (MOTHER) AND ARCHIE (AKA JEFFREY) NOT HELP HIM (FATHER).

I FURTHER CERTIFY THAT THE COPY OF THE OFFICIAL RECORD ATTACHED HERETO IS A TRUE AND ACCURATE COPY OF OUR MEMBERSHIP ROLL.

/s/ Joan Decker
ENROLLMENT DIRECTOR

422-a 5/8

½ u-33586 Davis, Alex (B. 09-18-89)M.*

I hereby certify that this is a true and exact copy of the document on file at the Pine Ridge Agency. Dated this 12th day of June, 1992.

/s/ Joan Decker
Enrollment Director

(4)

Supreme Court, U.S.
FILED
AUG 13 1993
OFFICE OF THE CLERK

No. 93-18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LELAND AND KARLA SWENSON,
Petitioners

v.

OGLALA SIOUX TRIBE,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE IDAHO SUPREME COURT

PETITIONER'S REPLY BRIEF

CAROLYN SENECA STEELE*
JAMES S. UNDERWOOD, JR.
605 W. Franklin Street
Boise, Idaho 83702
(208) 342-6532
Counsel for Petitioners

August, 1993

*Counsel of Record

THE PRINTING PRESS • 344-1117 • BOISE, IDAHO 83702

9 pp

BEST AVAILABLE COPY

QUESTION PRESENTED

Does the broad application of the Indian Child Welfare Act which Respondent advocates violate the Due Process Clause of the Constitution?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

DISCUSSION 1

Respondent raises the issue of how Congress intended Indian tribes to benefit from the Indian Child Welfare Act but omits a necessary part of the discussion, which is, that the broad application of the act which Respondent advocates violates the Due Process Clause of the Constitution.

CONCLUSION 5

TABLE OF AUTHORITIES

CASES: PAGE

In re Kahlen W., 285 Cal. Rptr. 507 (Cal. App. 5 Dist.1991) 3

Matter of Adoption of a Child of Indian Heritage, 543 A.2d 925 (N.J. 1988) 3

Morton v. Mancari, 417 U.S. 535, 554, 94 S.Ct. 2474, 41 L. Ed. 2d 290 (1974) 2

United States v. Antelope, 430 U.S. 641, 645, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977) 3

MISCELLANEOUS:

48 Stat. 986, 25 U.S.C. § 472, the Indian Reorganization Act 2

25 U.S.C. § 1903(4) and (5), the Indian Child Welfare Act 4

PETITIONER'S REPLY BRIEF

I.

Respondent raises the issue of how Congress intended Indian tribes to benefit from the Indian Child Welfare Act but omits a necessary part of the discussion, which is, that the broad application of the Act which Respondent advocates violates the Due Process Clause of the Constitution.

If the Indian Child Welfare Act (ICWA) is constitutional, it is because it applies only to Indians who are members of federally recognized tribes. It was enacted as a means for tribes to assist tribal members to safeguard and preserve their parental rights. The ICWA was never intended to control custody decisions for children who are Indian by blood, but who are not tribal children. Courts and advocates have demonstrated a fundamental misunderstanding of the difference between "Indian" as a racial designation and "Indian" as a political identity. The application of the ICWA which Respondent advocates violates the Due Process Clause of the Constitution because it is racially based and is therefore invidiously discriminatory.

The ICWA recognizes the quasi-sovereign status of tribal governments. It provides a means for tribal courts to exercise their own judgment in determining the custody of tribal children and provides preference for placement within the tribe. Respondent claims that tribes have rights in the custody of a child even where the child has no substantive ties to a tribe, a reservation, or an Indian family. Respondent essentially takes the position that all that needs be present is a possible genetic connection to the Indian race. It asks this Court to sustain this impermissible application of the ICWA.

The child in this case was not claimed as eligible for membership by the Oglala Sioux Tribe at the time the custody proceedings took place. At no time did the tribe's witnesses represent that the child was eligible for membership in the tribe. The only evidence on this subject came from the Petitioners who submitted an affidavit from the tribal enrollment director who said the tribe did not then know if the child was eligible for membership or not. Although the tribe enrolled the child two years later without notifying or contacting the Idaho court or the parties to the custody proceedings, the child was not enrolled at the time of the proceedings, enrollment is not a matter of record in the trial proceedings, and could not have been considered by the trial court. The trial court could not lawfully apply the ICWA to this child's custody.

This Court has previously considered the question of whether federal statutes which make distinctions between Indians and non-Indians violate the Due Process Clause. The Court has concluded that such laws are constitutional if they are an expression of the federal trust responsibility. For example, the Court considered the constitutionality of the Indian Reorganization Act, 48 Stat. 986, 25 U.S.C. §472, which provides for Indian preference in hiring within the Bureau of Indian Affairs (BIA). Non-Indian employees of the BIA argued that the preference constituted invidious racial discrimination. This Court held that the preference was acceptable, reasoning as follows:

> "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."

See Morton v. Mancari, 417 U.S. 535, 554, 94 S.Ct. 2474, 41 L. Ed. 2d 290 (1974).

In a case which this Court decided in 1977, the question presented was whether federal criminal statutes violated the Due Process Clause of the Fifth Amendment by subjecting Indians to federal criminal prosecution. The Court held that the accused were subject to federal criminal jurisdiction because they were enrolled members of the tribe, not because they were of the Indian race.

> "The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal government's relations with Indians." *United States v. Antelope*, 430 U.S. 641, 645, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977) (Emphasis added.)

This Court has made it clear that federal Indian law is applicable to individual Indians on the basis that they are members of a tribe, not because they are Indian by race.

State court decisions applying the ICWA demonstrate a lack of understanding of the question of who is an Indian for purposes of federal law. The courts of New Jersey and California particularly misunderstood that the ICWA is an expression of the trust doctrine. These courts apply the ICWA to the custody of any child who appears to have Indian blood. *See Matter of Adoption of a Child of Indian Heritage,* 543 A.2d 925 (N.J. 1988); and, *In re Kahlen W.*, 285 Cal. Rptr. 507 (Cal. App. 5th Dist. 1991). This application of the ICWA is contrary to the above-cited decisions of this Court. The courts

of these states also ignore the policy and purpose of the ICWA and the express language of the statute, which precisely defines "Indian child" and "Indian child's tribe". 25 U.S.C. §1903(4) and (5). These definitions are critical because they limit the applicability of the ICWA.

The child in the instant case is reputedly the biological offspring of one Indian and one Caucasian parent. However, his custody is not to be placed in the hands of a tribe because of his racial composition. A tribe's right to assert jurisdiction or to determine placement is based on a showing that the child belongs to the tribe. Tribes may not interfere with the custody of children who are not tribal members or are not shown to be eligible to become tribal members at the time the adoption or termination proceedings take place.

In presenting its view of the case, Respondent misstates the facts as found at the trial of this matter. The trial court's findings of fact may be found in the Supplemental Appendix at pages nine through eleven. (9sa-11sa). The record confirms that the reputed biological father of Baby Boy Doe, Jeff Nothelphim, has demonstrated no interest in the child. Contrary to Respondent's representations that information was kept from him about the child's welfare and whereabouts, the record establishes that Jeff Nothelphim refused to respond to requests from his court-appointed counsel to communicate with his attorney about the child, even by telephone. (R. 159-169). The Oglala Sioux Tribe did not seek to preserve or protect Nothelphim's parental rights at the trial of the matter.

None of Respondent's arguments in support of the application of the ICWA to the facts of this case are germane because it was not established at trial that the child was eligible to become a tribal member. The trial court found that the tribe had not established this fact.

CONCLUSION

Respondent has not presented a basis for denying certiorari in this case. In fact, the arguments which Respondent advances serve to underscore the confusion which abounds among the states in interpreting this federal law.

The ICWA was meant to be a shield to prevent harm. The courts should not allow it to become a sword to cut off the rights of parents and children alike who have no substantive connection to an Indian tribe. The cases are clear that even the interests of tribes and their members often diverge.

How are the substantive provisions of the ICWA to be interpreted by the states? May a state court make a determination of eligibility for tribal membership in place of the tribe? What is a constitutionally permissible application of this law?

Petitioners pray that this Court will consider these issues and that the petition for a writ of certiorari be granted.

Respectfully submitted,

CAROLYN SENECA STEELE
JAMES S. UNDERWOOD, JR.
605 W. Franklin Street
Boise, Idaho 83701
(208) 342-6532
Counsel for Petitioners

Supreme Court, U.S.
FILED
AUG 27 1993

No. 93-18

In The

Supreme Court of the United States

October Term, 1993

LELAND AND KARLA SWENSON,

Petitioners,

v.

OGLALA SIOUX TRIBE,

Respondent.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

RESPONDENT'S SUPPLEMENTAL BRIEF

HOWARD A. BELODOFF
Counsel of Record
Idaho Legal Aid Services, Inc.
P.O. Box 913
Boise, Idaho 83701
(208) 336-8980

ROBERT J. MCCARTHY
Idaho Legal Aid Services, Inc.
P.O. Box 973
Lewiston, Idaho 83501
(208) 743-1556

Counsel for Respondent

August, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. SUPREME COURT RULES PROHIBIT PETITIONERS FROM CHALLENGING THE CONSTITUTIONALITY OF THE ICWA AT THIS LATE STAGE IN THE PROCEEDINGS 1

II. PETITIONERS' BELATED CONSTITUTIONAL CHALLENGE IS BASED ON THE FALSE ASSERTION THAT THE CHILD WAS NOT SHOWN TO BE ELIGIBLE FOR MEMBERSHIP IN THE TRIBE AT THE TIME OF THE CUSTODY PROCEEDINGS 3

III. APPLICATION OF THE ICWA IN THIS CASE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE CONSTITUTION 5

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES:

Application of Angus, 655 P.2d 208 (Or. App. 1982), *cert. denied sub. nom. Woodruff v. Angus*, 464 U.S. 830 (1983) 6

In Interest of Armell, 550 N.E. 2d 1060 (Ill. App. 1 Dist.), *cert. denied sub. nom. Armell v. Prairie Band of Potawatomi Indians*, ___ U.S. ___, 112 L.Ed.2d 310 (1990) 6

In re Appeal in Pima County Juvenile Action, 635 P.2d 187 (Ariz. App. 1981), *cert. denied sub. nom. Catholic Social Servs. v. P.C.*, 455 U.S. 1007 (1982) 6

In re Baby Girl A., 282 Cal. Rptr. 105 (Cal. App. 4 Dist. 1991) 7

In re Guardianship of D.L.L. & C.L.L., 291 N.W.2d 278 (S.D. 1980) 6

Morton v. Mancari, 417 U.S. 535 (1974) 7

Sizemore v. Brady, 235 U.S. 441 (1914) 8

State ex rel Children's Services Div. v. Graves, 848 P.2d 133 (Or. App. 1993) 7

Stephens v. Cherokee Nation, 174 U.S. 445 (1899) 7

United States v. Antelope, 430 U.S. 641 (1977) 8

United States v. Rogers, 4 How. 567 (1846) 8

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

H.R. Rep. No. 95-1386 (1978), at 12-18, *reprinted in* 1978 U.S. Code Cong. & Admin. News 7530 7

Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901 *et seq* ..... *passim*

No. 93-18

In The

Supreme Court of the United States

October Term, 1993

LELAND AND KARLA SWENSON,

Petitioners,

v.

OGLALA SIOUX TRIBE,

Respondent.

On Petition For Writ Of Certiorari
To The Idaho Supreme Court

RESPONDENT'S SUPPLEMENTAL BRIEF

ARGUMENT

I. SUPREME COURT RULES PROHIBIT PETITIONERS FROM CHALLENGING THE CONSTITUTIONALITY OF THE ICWA AT THIS LATE STAGE IN THE PROCEEDINGS.

Petitioners raise the issue of the constitutionality of the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901 *et seq.*, for the first time in Petitioners' Reply Brief. This issue of constitutionality was not addressed by the trial court, nor by the district court, nor by the Idaho Supreme Court, nor by the Petition for Certiorari, nor even by Respondent's Brief in Opposition.

Raising this issue at this late stage of the proceedings is highly inappropriate and adds nothing to Petitioners' case. The Rules of the Supreme Court provide that only the questions set forth in the petition, or fairly included therein, will be considered by the Court. Rule 14.1.(a). The Petitioners are required to set forth the stage in the proceedings at trial and appellate courts where a federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a Writ of Certiorari. Rule 14.1.(h).

A Reply Brief may address only those arguments first raised in the Brief in Opposition. Rule 15.6. Although Petitioners strain to find that Respondents urge an overly broad application of the Act, the facts do not support Petitioners' hyperbole. Petitioners claim that "Respondent essentially takes the position that all that needs to be present is a possible genetic connection to the Indian race." (Pet'r Reply Br. 1.) Of course, Respondents have taken no such position, asserting only that the Act by its own terms applies to a child who is eligible for membership in an Indian tribe. (Resp't Br. Opp. 8-16).

Thus, Petitioners' belated attempt to construct and destroy a straw man must fail. There is much more to this case than a "possible genetic connection to the Indian race." The evidence before the trial court conclusively established the child's eligibility for enrollment. (10 a).

Petitioners' belated challenge to the constitutionality of the ICWA is nothing more than a desperate attempt to prolong these custody proceedings in hopes of increasing their chances of retaining physical custody of the child on a permanent basis. Indeed, Petitioners have asked the

trial court, on remand, to stay further custody proceedings pending resolution by this Court of the Petition for Certiorari. Respondents pray the Court will swiftly reject Petitioners' Reply Brief and deny the Petition for Certiorari.

II. PETITIONERS' BELATED CONSTITUTIONAL CHALLENGE IS BASED ON THE FALSE ASSERTION THAT THE CHILD WAS NOT SHOWN TO BE ELIGIBLE FOR MEMBERSHIP IN THE TRIBE AT THE TIME OF THE CUSTODY PROCEEDINGS.

Petitioners do not argue that the Act is unconstitutional as applied to a child who is eligible for membership. Rather, Petitioners assert that the Act may not be applied to Indians merely on the basis of "a possible genetic connection to the Indian race." (Pet'r Reply Br. 1.)

Petitioners assert that "Tribes may not interfere with the custody of children who are not tribal members or are not shown to be eligible to become tribal members at the time the adoption or termination proceedings take place." (Pet'r Reply Br. 4.)

Petitioners charge that the "child in this case was not claimed as eligible for membership by the Oglala Sioux Tribe at the time the custody proceedings took place." (Pet'r Reply Br. 2.) Traveling down the same mistaken path, Petitioners falsely proclaim that "it was not established at trial that the child was eligible to become a tribal member." (*Id.* at 4.)

Obviously, the Tribe's very intervention was premised upon its claim that the child was eligible for membership. Indeed, even the trial court initially acknowledged the "determination by the tribe that the child was eligible for membership in the tribe." (3a.)

Unfortunately, Petitioners and the trial court alike since have confused "eligibility for membership" with the administrative function of "enrollment." However, Petitioners no longer have any excuse for such confusion, since the Idaho Supreme Court distinguished the two and found that the evidence at trial conclusively established the child's eligibility for membership. The Idaho Supreme Court stated:

> In this case, the evidence presented to the trial court established the applicability of ICWA. The evidence contained the tribe's requirements for "enrollment." Although enrollment and membership are not synonymous, eligibility for enrollment is evidence that the requirements for membership are met. 44 Fed. Reg. 67,584, 67,586 (enrollment is a common but not exclusive evidentiary means of determining membership in a tribe). Enrollment is an administrative function. The core of the inquiry under ICWA is eligibility for membership in the parent's tribe. The affidavit of the enrollment director explains the only reason the tribe could not make a conclusive determination regarding the child's eligibility for enrollment was because the application was missing documentary evidence regarding paternity in the form of a birth certificate or paternity affidavit. The trial court, however, found that the father is one of the child's parents. This finding, together with the father's

> ownership of land on the reservation, establishes the child's eligibility for membership in the tribe. The other requirements for enrollment go to the administrative aspect of enrollment and are not requirements of eligibility for tribal membership.

(10a-11a.)

III. APPLICATION OF THE ICWA IN THIS CASE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

No court has held that the ICWA is unconstitutional; indeed every court presented with the question has affirmed the constitutionality of the Act.

The Appellate Court of Illinois held that the ICWA does not violate the constitution, stating that:

> Federal legislation with respect to Indian tribes is not based upon impermissible racial classifications, but derives from the special status of Indians as members of a quasi-sovereign tribal entities. (Citations omitted.) Moreover, the Commerce Clause (U.S. Const. art. I, § 8), gives Congress plenary power to regulate Indians on or off a reservation and provided the congressional authority for enactment of the ICWA. (Citations omitted.)
>
> Furthermore, when laws which grant special treatment to Indians are rationally related to the fulfillment of Congress' unique obligation toward Indians, those legislative judgments will not be disturbed. (Citations omitted.) The provisions of ICWA were deemed by Congress to be essential for the protection of Indian culture and

> to assure the very existence of Indian tribes. Those provisions do not contravene equal protection. (Citation omitted.)
>
> Regarding the . . . contention that the ICWA lacks a rational basis, we conclude that the protection of the integrity of Indian families is a permissible goal that is rationally tied to the fulfillment of Congress' unique guardianship obligation toward Indians. (Citations omitted.)

In Interest of Armell, 550 N.E. 2d 1060, at 1067-68 (Ill. App. 1 Dist.), *cert. denied sub. nom. Armell v. Prairie Band of Potawatomi Indians*, ___ U.S. ___, 112 L.Ed.2d 310 (1990). Eleanor Armell, a 3-1/2 year old child, was eligible for membership but not enrolled in the Potawatomi tribe at the time she was placed into a foster home by the state court. She had never lived on a reservation and had no contacts with the tribe. *Id.* at 1062. The Appellate Court held, nonetheless, that even after four years in a foster home, transfer of jurisdiction to the tribal court was necessary and appropriate under the ICWA. *Id.* at 1065.

Other cases upholding the constitutionality of the Act include *In re Guardianship of D.L.L. & C.L.L.*, 291 N.W.2d 278, 282 (S.D. 1980), wherein the Supreme Court of South Dakota held Indian children were not denied due process or equal protection by exclusive tribal jurisdiction. In *In re Appeal in Pima County Juvenile Action*, 635 P.2d 187, 193 (Ariz. App. 1981), *cert. denied sub. nom. Catholic Social Servs. v. P.C.*, 455 U.S. 1007 (1982), the Court of Appeals of Arizona reached the same conclusion. The Court of Appeals of Oregon, in *Application of Angus*, 655 P.2d 208, 213 (Or. App. 1982), *cert. denied sub. nom. Woodruff v. Angus*, 464 U.S. 830 (1983), held that the application of

ICWA provisions governing parental consent to adoptive placements did not violate the Fifth Amendment. The Court of Appeals of Oregon more recently held that different standards of proof for termination of parental rights of Indians and non-Indians does not constitute a violation of equal protection. *State ex rel Children's Services Div. v. Graves*, 848 P.2d 133 (Or. App. 1993). The California Court of Appeals ruled that the ICWA is not unconstitutional in placing further restrictions on a mother's choice of where her child could be placed. *In re Baby Girl A.*, 282 Cal. Rptr. 105, 110 (Cal. App. 4 Dist. 1991).

The legislative history to the ICWA includes extensive discussion of the foundations of Congressional power to legislate in the area of child custody proceedings and specifically with respect to Indian tribes and Indian children. H.R. Rep. No. 95-1386 (1978), at 12-18, *reprinted in* 1978 U.S. Code Cong. & Admin. News 7530. Congress rejected the suggestion that the ICWA violated constitutional restraints in any manner.

The legislative history specifically addresses the question of individuals not formally enrolled as members of an Indian tribe. The legislative history notes that the Supreme Court upheld the constitutionality of the congressionally-mandated Indian hiring preference in the Bureau of Indian Affairs, although the preference explicitly extends to non-member Indians. *Id.* at 16, *citing Morton v. Mancari*, 417 U.S. 535 (1974). The legislative history cites other case law establishing that Congress may define "Indian" without regard to tribal enrollment laws, for purposes of federal statutes and jurisdiction. *Id., citing Stephens v. Cherokee Nation*, 174 U.S. 445 (1899) (Congress may disregard existing membership rolls and direct that

per capita payments be made upon the basis of a new roll); *Sizemore v. Brady*, 235 U.S. 441 (1914) (Congress may determine tribal membership); *United States v. Rogers*, 4 How. 567 (1846) (Congress may disregard tribal membership criteria and determine for itself whether a person is an Indian for purposes of a federal criminal statute); *United States v. Antelope*, 430 U.S. 641, 646 n. 7 (1977) ("It should be noted, however, that enrollment in an official tribe has ~~not been held~~ to be an absolute requirement for federal jurisdiction.")

The legislative history concludes:

> If the courts have found that Congress has the power to act with respect to nonenrolled Indians in the foregoing kinds of circumstances, how much more is its power to act to protect the valuable rights of a minor Indian who is eligible for enrollment in a tribe? This minor, perhaps infant, Indian does not have the capacity to initiate the formal, mechanical procedure necessary to become enrolled in his tribe to take advantage of the very valuable cultural and property benefits flowing therefrom. Obviously, Congress has power to act for their protection. The constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical process established under tribal law, particularly with respect to Indian children who, because of their minority,

> cannot make a reasoned decision about their tribal and Indian identity.

Id. at 16-17.

CONCLUSION

Petitioners' belated attack on the constitutionality of the ICWA is not allowable under Supreme Court rules. Petitioners have distorted the record in a vain attempt to provide some factual basis for their erroneous claim that the child was not shown to be enrollable at trial. The ICWA is a constitutionally permissible exercise of plenary congressional authority regarding Indian affairs.

Respondent prays the Court will disregard Petitioners' Reply Brief and summarily deny the petition for certiorari.

Respectfully submitted,

HOWARD A. BELODOFF
Counsel of Record
Idaho Legal Aid Services, Inc.
P.O. Box 913
Boise, Idaho 83701
(208) 336-8980

ROBERT J. MCCARTHY
Idaho Legal Aid Services, Inc.
P.O. Box 973
Lewiston, Idaho 83501
(208) 743-1556

Counsel for Respondent